LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 31 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965

No. 183

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees,

vs.

HAROLD WILLIAM KRONSBEIN, et al.,
Appellant.

On Appeal from the Supreme Court of Illinois.

JURISDICTIONAL STATEMENT.

KENNETH F. KELLY,
1308a Niedringhaus Avenue,
Granite City, Illinois,
McGLYNN & McGLYNN,
(ROBERT E. McGLYNN),
120 North Main Street,
East St. Louis, Illinois,
Attorneys for Appellant,
Harold William Kronsbein.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

BLANK PAGE

INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Federal Constitutional Provision Involved	4
State Statute Involved .....5, Appendix E	A-39-41
Questions Presented	5
Statement	8
The Questions Are Substantial	17
I. This Court has jurisdiction	17
II. The Supreme Court of Illinois ignored the proceedings and issues in the trial and Appellate Courts in applying Section 14 of the Eminent Domain Act to the facts and circumstances as to the appellant in the case at bar, and in so doing makes said section void in denying due process to appellant in violation of the Fourteenth Amendment to the Federal Constitution	21
III. Illinois Eminent Domain Procedure as to the case at bar	22
IV. The ruling of the Supreme Court of Illinois ignores the requirement of a judicial proceeding to determine the owners and persons interested and entitled to compensation	26
V. The intent of Section 14 of the Act of 1953 is best expressed by its amendment in 1955	27
VI. Effect of proceedings and issues in the trial court	28

VII. Constitutional Guarantees of Due Process under the 14th Amendment 31

A. Application of the due process clause of the Fourteenth Amendment to the Federal Constitution 31

B. Issues not raised in trial or Appellate Courts could not be considered in the Supreme Court of Illinois 36

Conclusion 37

APPENDICES.

Appendix A: Opinion of the Supreme Court of Illinois A-1-5

Appendix B: Modified Opinion of the Supreme Court of Illinois A-6-8

Appendix C: Opinion of Appellate Court, Fifth District of Illinois A-9-22

Appendix D: Opinion of the Trial Court, Madison County, Illinois A-23-38

Appendix E: Pertinent Sections of the Eminent Domain Act of Illinois, Chapt. 47, Ill. Rev. Stat.:

Section 1 ..... A-39

Section 9 ..... A-39

Section 10 ..... A-39

Section 14 (1953) A-40

Section 14 (1955) A-41

Table of Cases.

American Surety Co. v. Baldwin, 287 U. S. 156, 164 .. 20

Atchison R. Co. v. Pub. Utility Comm., 346 U. S. 346-8-9 3

Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 61..2, 3, 20

Bartlow v. Chi. B. & Q. R. R. Co., 243 Ill. 332, 336, 90 N. E. 721 ..... 14, 30
Bouie v. City of Columbia, 378 U. S. 347, 354 ..... 4, 37
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673-7-8 ..... 4, 20

C. B. & Q. Ry. v. Chicago, 166 U. S. 226, 235-6-9, 241 ..... 18, 32, 33
City of Chicago v. Gage, 268 Ill. 232, 239, 109 N. E. 28 ..... 23, 25
Chicago G. W. R. Co. v. Basham, 249 U. S. 164, 167 .. 4
Chicago Housing Authority v. Cooper, 19 Ill. App. 2d 441-4, 154 N. E. 2d 308 23
City of Chicago v. Pick, 251 Ill. 594, 598-9, 96 N. E. 539 ..... 27, 29
Chicago In Trust for Use of Schools v. Fischer, 52 Ill. App. 2d 55, 58-9, 60, 201 N. E. 2d 660 25
Clark v. Leavitt, 335 Ill. 184, 190-1-2, 166 N. E. 538 .. 30
Cohen v. City of Chicago, 377 Ill. 221-9, 36 N. E. 2d 220 35
Cole v. Arkansas, 333 U. S. 196, 200, 201, 202 ..... 4, 37
Convers v. Atchison, T. & S. Co., 142 U. S. 671 .. 23, 24, 29
Corcoran v. City of Chicago, 373 Ill. 567, 570, 27 N. E. 2d 451 19
County of Cook v. Vander-Wolf, 394 Ill. 521-8-9, 69 N. E. 2d 256 ..... 16, 23, 24, 29
Crane Construction Co. v. Symons Co., 25 Ill. 2d 521-7, 185 N. E. 2d 139 36

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290 ..... 3, 18
Dept. of Pub. Wks. v. Butler, 13 Ill. 2d 537, 547-8, 150 N. E. 2d 124 34
Dobbins v. First Nat. Bank of Peoria, 112 Ill. 553, 562 35

Ettor v. Tacoma, 228 U. S. 148, 157 26

Forest Preserve Dist. v. Chi. Title & Trust Co., 351 Ill. 48, 55, 183 N. E. 819 ..... 16, 24

Forest Preserve Dist. v. Christopher, 321 Ill. App. 91, 100, 101, 52 N. E. 2d 313 23

Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358, 367 20

Hamilton v. Regents U. of Colo., 293 U. S. 245, 261.. 3
Hanson v. Denckla, 357 U. S. 235, 244 ..... 2, 3
Herndon v. Georgia, 295 U. S. 441-3-4 ..... 4, 20

Largent v. Texas, 318 U. S. 418, 421 3
Lawrence v. State Tax Comm., 286 U. S. 276, 282-3.. 3, 19

Malloy v. Hogan, 378 U. S. 1, 4, 5..... 33
McCollum v. Bd. of Education, 333 U. S. 203, 206.... 3
Missouri v. Gehner, 281 U. S. 313, 320..... 4, 20
Mueller v. Elm Park Hotel Co., 391 Ill. 391-8-9, 63 N. E. 2d 365 36

Ohio v. Akron Park Dist., 281 U. S. 74-9..... 20

Peo. v. Clark, 283 Ill. 221, 225, 119 N. E. 329 35
Peo. v. Kelly, 361 Ill. 54, 59, 196 N. E. 2d 795..... 35
Peo. v. Kingery, 369 Ill. 289, 291, 16 N. E. 2d 761 26
Peo. v. Lindheimer, 371 Ill. 367, 372, 21 N. E. 2d 318 35
Peo. v. Smith, 374 Ill. 286-8-9, 291, 29 N. E. 2d 274.. 26
Peo. ex rel. Carpentier v. Treloar, 13 Ill. 2d 596, 601, 150 N. E. 2d 624 36

Saunders v. Shaw, 244 U. S. 317, 320..... 4, 20
South Park Com'rs. v. Todd, 112 Ill. 379, 382-3..... 30

Williams v. Georgia, 349 U. S. 375, 383 ..... 4, 37
Winters v. New York, 333 U. S. 507, 509..... 3

Yellow Cab Co. v. Howard, 243 Ill. App. 263, 272, 275, 276 25

Constitutions:

United States:
Amend. XIV, § 1 ..... 4, 5, 31, 34
Illinois:
Sec. 13, Article II 26, 34

Statutes:

28 U. S. C., § 1257 (2) 2, 3, 18
28 U. S. C., § 2103 2
Illinois Rev. Stat. 47:
Sec. 1 ..... 5, 22, Appendix E, A-39
Sec. 9 ..... 5, 23, Appendix E, A-39
Sec. 10 ..... 5, 23, Appendix E, A-39
Sec. 14 ..... 5, 23, 27, Appendix E, A-40

Rules of Court:

Rule 39, Illinois Supreme Court 36
Rule 7, Illinois Appellate Courts 36

BLANK
PAGE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. .....

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees,

vs.

HAROLD WILLIAM KRONSBEIN,
Appellant.

On Appeal from the Supreme Court of Illinois.

JURISDICTIONAL STATEMENT.*

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Appellant, Harold William Kronsbein, appeals from the judgment of the Supreme Court of Illinois, entered on

* In order to understand the ruling of the Illinois Supreme Court, of necessity the issues in the trial, Appellate and Supreme Courts of Illinois, together with excerpts from Appellee's briefs, and their petition for leave to appeal, had to be herein set forth. It was also necessary to set out certain court rulings in Illinois in condemnation proceedings. We beg the court's indulgence because the statement is unavoidably long. Emphasis is added in this statement unless otherwise explained.

November 19, 1965, becoming final on January 24, 1966, reversing the judgment of the Appellate Court for the Fifth District of Illinois, entered on December 15, 1964, and the judgment of the Circuit Court of Madison County, Illinois, entered on August 2, 1963, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented. The Statement has been prepared so as to include all the material that would be appropriate in a petition for certiorari. 28 U. S. C., Sections 1257 (3), 2103. Hanson v. Denckla, 357 U. S. 235, 244; Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 61.

OPINIONS BELOW.

The final draft of the opinion of the Supreme Court of Illinois is reported in 35 Ill. 2d 575 and 213 N. E. 2d 261; the original opinion, filed November 19, 1965, is printed as Appendix A, infra; and, the modified pages to said opinion, filed on January 24, 1966, is printed as Appendix "B", infra. The opinion of the Appellate Court, Fifth District of Illinois, reported in 54 Ill. App. 2d 337, 203 N. E. 2d 605, is printed as Appendix "C", infra. The opinion of the trial court is not reported, but is printed as Appendix "D", infra.

JURISDICTION.

Appellant filed a motion in the trial court to vacate a judgment in a condemnation proceeding, wherein appellees took his property, **a now admitted vested remainder interest in fee, without any compensation paid or secured to him for said property.** The trial court vacated its judgment and orders as to appellant. Appellees appealed to the Appellate Court which affirmed the trial court. Appellees then appealed to the Supreme Court of Illinois, which reversed the Appellate and trial courts, by its

judgment and opinion on November 19, 1965. A timely Petition for Rehearing was filed in the Supreme Court of Illinois which was denied on January 24, 1966. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Illinois on the 19th day of April, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case.

Cases in support under Jurisdiction:

(1) Judgment of the Supreme Court of Illinois in applying Section 14 of the Eminent Domain Act of Illinois to the particular circumstances as to the Appellant, in the case at bar, makes said statute void as in violation of the due process provisions of the Fourteenth Amendment to the Constitution of the United States in denying to appellant any compensation for his property taken.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290, 42 Su. Ct. Rep. 106, 108;
Lawrence v. State Tax Com., 286 U. S. 276, 282-3;
Hamilton v. Regents U. of Colorado, 293 U. S. 245, 261;
Largent v. Texas, 318 U. S. 418, 421;
McCollum v. Board of Education, 333 U. S. 203, 206;
Winters v. New York, 333 U. S. 507, 509;
Atchison R. Co. v. Pub. Utility Com., 346 U. S. 346, 348-9;
Hanson v. Denckla, 357 U. S. 235, 244;
Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 61.

(2) Where Federal Constitutional question arises for the first time in the judgment of the Supreme Court of Illinois, and such application of said statute

arose from its unanticipated act in giving the statute a new construction, which threatened appellant's rights under the Fourteenth Amendment to the Constitution of the United States, appellant can raise said question in his petition for rehearing and it is timely.

Saunders v. Shaw, 244 U. S. 317, 320;
Missouri v. Gehner, 281 U. S. 313, 320;
Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673, 677-8;
Herdon v. Georgia, 295 U. S. 441, 443-4;
Cole v. Arkansas, 333 U. S. 196, 200, 201.

(3) Appellant was entitled to have the Supreme Court of Illinois consider his case, as it was tried, and on the issues presented in the trial and appellate courts of Illinois. The Supreme Court of Illinois injected an issue for the first time in its opinion, which was not considered in any of the proceedings, and, in so doing, denied appellant due process in violation of the due process clause of the fourteenth amendment to the federal constitution.

Cole v. Arkansas, 333 U. S. 196, 201;
Bouie v. City of Columbia, 378 U. S. 347, 354;
Williams v. Georgia, 349 U. S. 375, 383.

(4) Judgment of the Illinois Supreme Court became final on denial of the Petition for Rehearing on January 24, 1966.

Chi. G. W. R. Co. v. Basham, 249 U. S. 164, 167.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED.

". . . nor shall any state deprive any person of life, liberty or property, or property without due process of law . . ." U. S. Const., Amend. XIV, § 1.

STATE STATUTE INVOLVED.

Chapt. 47, Eminent Domain, Sections 1, 9, 10, 14 (1953) and 14 (1955). Appendix "E", pages A-39-41.

QUESTIONS PRESENTED.

1. The final judgment of the Supreme Court of Illinois, while admitting appellant was the owner of a vested remainder interest in fee in the property condemned and that he was never personally in court, in applying for the first time in said court a section of the Eminent Domain Act of Illinois to the particular circumstances of the case at bar, as to appellant, has prevented and denied payment of just compensation to said appellant, and has considered the case at bar on points not raised and on issues not had in the trial court, and in considering said matters not raised in the Appellate Court, and by so doing, has denied appellant due process in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Illinois in applying Section 14 of the Eminent Domain Act of Illinois to the circumstances as to the appellant, in the case at bar, has denied the payment of, or the securing of just compensation for the taking of his property in a condemnation proceeding and said statute, as applied, is unconstitutional as in violation of the constitutional guarantees of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Illinois applied and enforced to appellant's disadvantage a statute which the appellant seasonably insisted as so applied and enforced was repugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution and void.

4. The Supreme Court of Illinois has held the interest of appellant to be a vested remainder and any answer filed for him in the trial proceeding was void, but by reversing the appellate and trial courts, the said court has ignored the consideration of the case at bar as it was tried and as the issues were determined in the trial court, and has, in effect, reinstated the original judgment of the trial court which held appellant had no compensable interest, and has denied appellant due process in violation of the Fourteenth Amendment to the Federal Constitution.

5. The Supreme Court of Illinois, in deciding the case on a point not raised, or argued, by appellees in the trial or appellate courts has, by the application of said Illinois statute, to the circumstances of the case at bar as to appellant denied due process to appellant, as guaranteed by the Fourteenth Amendment to the Federal Constitution, and, as such, said statute is void.

6. The Supreme Court of Illinois held that appellant had a vested interest in the property condemned. That by reversing the trial court, the Supreme Court now says he has no interest, because under the circumstances of the case at bar, as tried, and on the issues presented, the trial court in the condemnation proceeding, preliminary to determining compensation, had determined from the petition and issue joined that appellant was a contingent remainderman and not entitled to compensation, and, after the compensation was determined, ordered full compensation paid to a now admitted life tenant as being vested with title and owners of the property. In so applying said Section 14 of the Eminent Domain Act to the circumstances of the case at bar, as to appellant, makes said statute unconstitutional under the Fourteenth Amendment to the federal constitution in denying due process to appellant in that:

(1) He has been deprived of his property without just compensation being paid or secured for him.

(2) That as the result of the judgment of the Supreme Court he has been denied any hearing as to compensation.

7. The Supreme Court of Illinois held that appellant's vested interest was not contested, but, in answering appellant's contention that payment of the compensation to the life tenant did not affect appellant's title, has held that, regardless of the fact that appellant had never been paid for his property, appellees' interest could not be affected, because the money had been deposited with the county treasurer. The application of said statute to the circumstances of the case at bar, as to appellant, has caused appellant's property to be taken from him, by an arm of the State of Illinois, without payment of compensation, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

8. In the condemnation proceeding, in the case at bar, appellees at their peril were to ascertain the true owner of the property, and appellant was not required to prove his title, and the averments in the petition were binding on appellees, but not on appellant. Appellees had the trial court decide ownership, and when it was incorrect, the only interest they acquired was the interest of the trustees under the will to whom they had the compensation paid to, and that interest is now admitted to be a life tenant's interest only. Appellees having never acquired appellant's vested interest, he has been denied compensation and the judgment of the Supreme Court of Illinois, in the application of said Section 14 of the Eminent Domain Act, has denied appellant due process in violation of the due process clause of the fourteenth amendment to the federal constitution.

9. Said Section 14 of the Eminent Domain Act has never been construed, as the Supreme Court of Illinois has done in the case at bar, by any previous Supreme Court opinion, and said statute has never been held to so apply where, as in

the case at bar, the trial court, on the petition, and issue joined, has determined the interests of the parties in the property prior to a hearing on the ascertainment of just compensation. By the construction of said statute, as to the circumstances in the case at bar, the defendant has been deprived of his property without just compensation and in violation of the due process clause of the Fourteenth Amendment to the federal constitution, and said statute would be void.

STATEMENT.

In 1910 Henry Fehling died testate devising to a daughter, Frieda M. Fehling (Kronsbein), an interest in trust, for her life, and at her death to her issue. Harold William Kronsbein, appellant, was her only child. It is now admitted that the only interest the trustees had under said will was a life estate, **and that the appellant was the owner of a vested remainder in fee** (Ill. Su. Ct. Opinion—Appendix A, page A-1).

The reference to the abstract of the trial and appellate court record, will be referred to as "Abs. of Rec. in Ill. Su. Ct."

Appellees, as school trustees, filed a petition to condemn the property devised under said will. They set out the interest of the appellant as a contingent remainder (Para. 8—Abs. of Rec. in Ill. Su. Ct., pg. 7, Trans. of Rec. 3).

An attorney, J. C. Steele, filed an answer for the trustees under the will, and, without the authority of appellant, included his appearance in said answer. The Answer was held void, and no jurisdiction was ever acquired by said Answer (Ill. Su. Ct. Opinion, Appendix A, pgs. A-1-2).

The above Answers joined issue with the allegations of the petition to condemn, and while denying the interest

of the Trustees under the will (Para. 7 of the Answer, Abs. of Rec. in Su. Ct. Ill., pg. 15, Trans. of Rec. 3), admitted that appellant's interest was that of a contingent remainderman (Para. 8 of the Answer—Abs. of Rec. in Su. Ct. Ill., pg. 15, Trans. of Rec., pg. 3).

Trial Proceedings and Issues in the Condemnation Proceeding.

The trial court heard the question of title, preliminary to a submission to a jury, as to compensation. Based on evidence submitted solely by the appellees, and on the said petition and answers of said Trustees, Frieda M. Kronsbein, and appellant, the said court entered a preliminary order on November 2, 1953, finding the trustees under the will vested with the title, and the interest of the appellant to be a contingent remainder; and, that by a stipulation the interest of a lessee was $4000.00, which could be included in a jury verdict (Abs. of Record in Su. Ct. of Ill.—pgs. 17-24, Trans. of Rec., pg. 3).

On November 3, 1953, the day following said preliminary order, a jury returned a verdict excluding lessee's interest (Abs. of Rec. in Su. Ct. Ill.—pg. 24—Trans. of R., pg. 3). On November 23, 1953, the trial court entered a judgment on the verdict of the jury, which again was based on the said petition and answers of the trustees, Frieda M. Kronsbein, and **Appellant**, and in said judgment found and provided:

> "3. **That the court, by a previous order entered in this cause, determined all of the preliminary questions, including title and ownership of said tract of ground sought to be condemned and entered a judgment for condemnation, and called a jury to ascertain the just compensation to be paid to the owner or owners and persons interested in said tract of ground described in said petition and to make a report thereof to the court, . . .**"

"It is Therefore Ordered, Adjudged and Decreed by the court, that judgment be and the same are hereby entered in the court on the verdict of the jury and also on the stipulation heretofore entered into and approved and in favor of the defendants for just compensation, and all damages for the tract or parcel of land described in said petition as follows:

Wm. Rapp, Lessee, the sum of .....$ 4,000.00

W. J. Steele and Ivy Steele, Trustees under the last will and testament of the late Henry Fehling, owners, the sum of .....$58,893.00;"

and ordered the sums found to be paid within 30 days to the county treasurer of Madison County, Illinois, for the benefit of the owners of, and parties interested (Abs. of Rec. in Su. Ct. of Ill. pgs. 25-29—Trans. of Rec., pg. 3).

The said preliminary order bore this notation "O. K. as to form, J. C. Steele" (Abs. of Rec. in Su. Ct. Ill.—pg. 24, Trans. of Rec., pg. 3), and the said judgment order bore this notation, "O. K., J. C. Steele, attorney for Trustees, Frieda M. Kronsbein and **Harold W. Kronsbein**" (Abs. of Rec. in Su. Ct. Ill.—pg. 29, Trans. of Rec. pg. 3).

On December 21, 1953, the trustees under the will petitioned the trial judge to pay the sum found due them, as owners, in the amount of $58,893.00 (Abs. of Rec. in Su. Ct. Ill.—pgs. 29-30, Trans. of Rec. pg. 3). Without any notice or hearing, and although said petition was signed only by the trustees, the trial court, in an order dated December 23, 1953, stated:

"**Now come** W. J. Steele and Ivy Steele, Trustees under Last Will and Testament of Henry Fehling, deceased, Frieda M. Kronsbein, nee Frieda M. Fehling, **and Harold William** Kronsbein, defendants in the above entitled cause and present to the Court here their petition praying for an order to direct the

> Treasurer of said County to pay to said Trustees the amount found due as damages to the lands in said proceeding condemned."

and entered the following order:

> "It is Therefore Ordered that Guy Harper, Treasurer of Madison County, Illinois, pay to said W. J. Steele and Ivy Steele, Trustees under the Last Will and Testament of Henry Fehling, deceased, the said sum of $58,893.00 and that their receipt therefor to him shall be a full release and acquittance of the said Treasurer from all liability for said funds" (Abs. of Rec. in Su. Ct. Ill. pgs. 31-32, Trans. of Rec., pg. 3).

Appellant contacted an attorney, who, on his behalf, filed a motion to vacate the judgments, heretofore entered, alleging the trial court was without jurisdiction, that he was the owner of the real estate, that he was never personally served, and that the attorney, J. C. Ste[illegible]ad no authority to and did not represent him (Abs. of Rec. in Su. Ct. Ill.—pgs. 32-43, Trans. of Rec., pg. 3).

The same trial judge who presided in the original condemnation granted the motions to vacate, and entered a judgment vacating the order entered on November 2, 1953, and the judgment entered on November 23, 1953, held said judgments void as to appellant (Abs. of Rec. in Su. Ct. Ill., pgs. 45-64, Trans. of Rec. 3. Trial Court Judgment, Appendix D, pgs. A-23-38).

The appellees then appealed to the Appellate Court of Illinois, and, in said court relied solely on the ground that appellees "were vested with the legal title," and that appellant was not a necessary party, and that the trial court ordered the entire award paid to appellees (Infra, p. 12).

Issues in the Appellate Court of Illinois.

In the Appellate Court appellees' only points raised were as follows:

I.

"The court acquired jurisdiction of Harold William Kronsbein.

A. Where the judgment finds that the court had jurisdiction of the cause it will be presumed that all steps were taken to warrant such finding (Brief pg. 3).

II.

Harold William Kronsbein was not a necessary party to the condemnation suit (Brief pgs. 3, 4).

III.

The claim of Harold William Kronsbein is barred by laches" (Brief pg. 5).

Appellees in their brief, in the Appellate Court, argued:

II-B. . . . **trustees, were vested with the legal title . . . were made parties . . . they represented all of the heirs . . . those heirs were not necessary parties . . .** (pg. 4).

II-C. The defendant Harold William Kronsbein was not a necessary party to the condemnation suit, and therefore whether he was properly served was of no consequence (pg. 4).

"It is apparent that the parties and the court, in the condemnation proceeding recognized that Harold William Kronsbein was not a necessary party to that suit because at the conclusion of the proceeding the entire award of compensation for the property was ordered paid to the trustees" (pg. 24).

In the concluding part of petitioner's Statement, Brief and Argument, in the Appellate Court, they recited:

"It is our position that Harold William Kronsbein was not a necessary party to the condemnation case, and that his claim should be denied by the application of laches" (pgs. 28-29).

See: Appellees' Brief, Appellate Court, wherein they were appellants (Trans. of Rec. 7).

Appellees admit and do not contest any of the following Appellate Court's findings and holdings which are set out in the opinion:

Pg. 4—

"On September 23, 1953, J. C. Steele, as attorney for W. J. Steele, Ivy Steele, trustees, Freida M. Kronsbein and Harold William Kronsbein, filed an instrument designated as an answer in said condemnation proceeding. This answer, although improper in this proceeding (Dept. of Public Works v. Lewis, 344 Ill. 253, 255), admitted most of the allegations of the petition, and concluded by averring that as trustees under the will of Henry Fehling, these defendants have no right to enter into any agreement for the sale of the premises sought to be condemned."

Pg. 10—

"In an Eminent Domain proceeding, the plaintiff is required at its peril, to ascertain and name in the petition the true owner of the land sought to be condemned and taken, and the person so named as owner in the petition is not required to prove title. Averments of the petition as to the nature and extent of the estate or title of the defendants are not binding on the defendants, but are on the petitioner."

Pg. 12—

"The trustees, therefore, had, at the time the petition was filed, a life estate for the life of Freida M. Kronsbein in the property sought to be condemned."

Pg. 11—

. . . "Under the authorities appellee had a vested remainder in the land sought to be condemned, possession only being postponed because of the life estate." . . . Being the fee owner of the premises sought to be condemned, he, Harold William Kronsbein, was an indispensable party to the proceeding.

There was no valid personal service . . . on defendant, Harold William Kronsbein, and the unauthorized answer filed by Mr. Joseph Steele, purporting to represent him did not give the court jurisdiction over his person. **Where an attorney entering the appearance of a defendant does so without authority, the judgment based on such fact is void.**

Pg. 18—

"**A payment to the life tenant in a condemnation proceeding is of no effect as to the remainderman.** (Bartlow v. C. B. and Q. R. R. Co., 243 Ill. 332, 336.)"

(Opinion App. Ct., Appendix C, pg. A-22.)

Issues in the Supreme Court.

Appellee's points set out in their petition for leave to appeal were as follows:

I.

The affidavit for publication filed in the County Court below was proper and appellee was duly served by publication.

II.

The Appellate Court erroneously based its opinion on two cases, one of which was not in point, and the other which was erroneously interpreted.

III.

The Appellate Court completely ignored or overlooked the fact that a lengthy offer of proof was made

by appellant in the County Court, which offer that court erroneously denied.

IV.

The Appellate Court overlooked or completely ignored the fact that the court files were not complete and that every presumption should be given to the verity of the findings of the court at the time of trial.

V.

The Appellate Court erred in applying the doctrine of strict construction, and its decision is in contravention of the spirit of the Civil Practice Act.

VI.

The Appellate Court erred in finding that the doctrine of laches was not applicable (Trans. of Rec. pg. 2).

It is noted that no point was raised about the deposit of the compensation with the county treasurer in any of the proceedings by appellees.

The Supreme Court of Illinois, injected the payment to the county treasurer for the first time in its first opinion, but did not mention any statute. However, after the filing of the petition for rehearing, and a request for clarification, the Supreme Court modified its opinion.

The original opinion reads as follows:

"The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was therefore unaffected. In fact, however, the compensation awarded by the jury **was deposited with the county treasurer pursuant to an order entered by the court. The disposition thereafter made of the money so deposited cannot affect the rights of the condemnors**" (Appendix A, Pg. A-5).

The modified opinion filed January 24, 1966, reads as follows:

> "The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was therefore unaffected. In fact, however, the compensation awarded by the jury was, **in accordance with section 14 of the Eminent Domain Act (Ill. Rev. Stat. 1953, Chap. 47, par. 14), by order of the court deposited with the county treasurer 'for the benefit of the owners of, and parties interested in said tract of land.'** The disposition thereafter made of the money so deposited cannot affect the rights of the condemnors **(Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co., 351 Ill. 48, 55; County of Cook v. Vander Wolf, 394 Ill. 521, 528)**" (Appendix B, Pgs. A-7-8).

The opinion acknowledged that appellant is the owner of a vested remainder in fee:

> "The defendant was her only child, and the appellate court held that he was the owner of a vested interest in the property, subject to the life estate in the trustees for the benefit of his mother. **This determination is not contested here** (Appendix 'A', pg. A-2)"

and, that the answer filed in the original proceeding was void as to appellant:

> "An answer was filed on behalf of the defendant by attorney Joseph C. Steele, but at the hearing on the motion to vacate by Joseph C. Steele and the defendant testified that Steele was not authorized to represent the defendant in the eminent domain proceeding. Whatever other consequences may flow from the unauthorized answer, it did not give the court jurisdiction over the defendant (Appendix 'A', pg. A-2)."

How Federal Question Arose.

The federal question, sought to be reviewed, arose for the first time when the Supreme Court of Illinois, in its opinion, held:

> "In fact, however, the compensation awarded by the jury was in accordance with Section 14 of the Eminent Domain Act, by order of the court deposited with the County Treasurer for the benefit of the owners of, and parties interested in said tract of land. The disposition thereafter made of the money so deposited cannot affect the rights of the condemnors" (Opinion pg. 3—Appendix A, pg. A-5).

Such question being so presented, appellant raised the constitutional objection in its petition for rehearing at the earliest time he could,[1] after which the court modified its opinion by setting out the statute relied upon, and citing two cases.[2]

THE QUESTIONS ARE SUBSTANTIAL.

Reasons Relied Upon to Require Plenary Consideration to Be Given by This Court With Briefs on the Merits and Oral Argument to Resolve the Important Questions Presented.

I.

This Court Has Jurisdiction.

The Supreme Court of Illinois while admitting appellant was the owner of a vested remainder interest in fee in the property condemned, and that he was never personally in court, by the application of Section 14 of the Eminent Domain Act of Illinois, permits the taking of

---

[1] Petition for Rehearing, Pgs. 4-21, Trans. of Rec. 18.

[2] Su. Ct. Modified Opinion, Appendix "B", Pg. A-8.

appellant's property without compensation made or secured to him and is, upon principle and authority, wanting in due process of law as required by the Fourteenth Amendment of the Constitution of the United States (C. B. & Q. Ry. v. Chicago, 166 U. S. 226-235-6-9, 241).

Appellant, at the first opportunity, raised the constitutional objections and stated that the application of the said statute, as to his particular circumstances in the case at bar, makes the statute void under the due process clause of the Fourteenth Amendment to the federal constitution. This is all that is required under Sec. 1257 (2) of the U. S. C.

The case at bar is of general importance, because if the opinion of the Supreme Court of Illinois is allowed to stand, then all a condemnor in Illinois would have to do would be to pay the compensation to a county treasurer, a non judicial officer, without any judicial determination of title. Such an interpretation ignores the rest of the Eminent Domain Act of Illinois, and would permit the county treasurer in his discretion to distribute the compensation, and would be unconstitutional on its face in denying due process.

The Supreme Court of Illinois ignored the constitutional objections. Appellant even filed a motion to vacate and modify the modified opinion of the said Supreme Court, and reiterated that the court had refused to consider the said constitutional objections, and again asked the court to reconsider them, but this was denied on March 22, 1966 (Trans. of Rec. Pg. 29).

In **Dahnke-Walker Milling Co. v. Bondurant**, 257 U. S. 282, at page 290 held:

> "our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the

> plaintiff seasonably insisted as so applied and enforced was repugnant to the constitution and void, the case is rightly here on writ of error."

and, appellant's constitutional rights are denied, where the Supreme Court of Illinois has refused to decide the question (Lawrence v. State Tax Commission, 286 U. S. 276, 282).

The above rulings have been repeatedly followed as shown by the other cases cited under "Jurisdiction".

The principle that has been enunciated being, that appellant make specific and plain in the State court his contention that the application of the statute to his particular circumstances would make the statute void under federal law.

Appellant in his petition for rehearing in the Supreme Court did not say that his federal rights prevented the application of the statute to him, but stated that the statute, as applied, was unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the federal constitution. This was clearly stated on page 16 of the petition for rehearing as follows:

> "If the statute, or law, is as the court now interprets it, we respectfully submit to the court that the statute is unconstitutional and we ask the court to now pass on its constitutionality. This is proper because this court, on its own, injected this question into the proceedings for the first time by its opinion, and this question can be raised in a petition for rehearing (Corcoran v. City of Chicago, 373 Ill. 567 at 570): 27 N.E.2d. 451.

(Pet. for rehearing, Pg. 16, Trans. of Rec. 18).

Not only did appellant say the statute was unconstitutional, as applied to the circumstances of the case at bar

to appellant, which this court has recently held to be sufficient for appeal (Bantam Books Inc. v. Sullivan, 372 U. S. 58, 61), but we asked the court to pass on its constitutionality as applied to the case at bar which the court refused.

The Question of Constitutionality Is Timely.

In **Saunders v. Shaw**, 244 U. S. 317, the court at page 320 held:

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."

In **Herndon v. Georgia**, 295 U. S. 441 on pages 443 and 444 the court held:

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. Saunders v. Shaw, 244 U. S. 317, 320; Ohio v. Akron Park District, 281 U. S. 74, 79; Missouri v. Gehner, 281 U. S. 313, 320; Brinkeroff-Faris Co. v. Hill, 281 U. S. 673, 677, 678; American Surety Co. v. Baldwin, 287 U. S. 156, 164; Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358, 367."

The Supreme Court of Illinois in its judgments for the first time mentioned the statute, Section 14 of the Eminent Domain Act of Illinois, by a supplement to its opinion, filed after a consideration of appellant's petition for rehearing. This statute had never been mentioned in the proceedings until appellant in its petition for rehearing

asked the Supreme Court to clarify its opinion (Appendix B, pg. A-6).

It is therefore apparent that the only time appellant could raise the question was the time at which he did in his petition for rehearing, and this court has jurisdiction of this appeal.

II.

The Supreme Court of Illinois Ignored the Proceedings and Issues in the Trial and Appellate Courts in Applying Section 14 of the Eminent Domain Act to the Facts and Circumstances as to the Appellant in the Case at Bar, and in So Doing Makes Said Section Void in Denying Due Process to Appellant and in Violation of the Fourteenth Amendment to the Federal Constitution.

The trial court, in the original proceeding on the pleadings and evidence offered, found and determined the interests of the parties. This was done before the jury hearing. **When the trial court determined the ownership, payment of compensation could only be made to such persons, and the payment made to the county treasurer would be for their benefit alone.**

When the trial court vacated its judgment, and found appellant's interest was a vested remainder in fee, which was affirmed in the Appellate Court, and admitted in the Supreme Court of Illinois, **it now stands admitted that the original judgment was void as to appellant and that appellees being required at their peril to determine the real owners, only acquired a life estate in the proceedings, and the payment of the compensation to a life tenant could not affect the appellant.**

The Supreme Court has held, in effect, that no judgment of the trial court is required to determine appel-

lant's interest, and the mere payment of the compensation to the county treasurer protects appellees. Such construction makes said Section 14 void as applied to the circumstances as to the appellant in the case at bar, and denies him due process under the fourteenth amendment to the federal constitution.

The Illinois and federal constitutions provide that private property cannot be taken without just compensation which must be paid, or secured to the owners.

It is admitted in these proceedings that eminent domain is a special statutory proceeding; that appellant, although made a party, was not required to prove his title, that appellees were bound to name the true owners and in determining such ownership they proceeded at their peril, and that appellees, in alleging the interest of appellant, were bound by it but appellant was not (Statement, Pg. 12, supra.

III.

Illinois Eminent Domain Procedure as to the Case at Bar.

The most important factor, in the case at bar, arises out of the erroneous and illegal construction placed by the Illinois Supreme Court, on an otherwise valid statute, and by said application to the circumstances of the case at bar, as to appellant, has denied appellant due process in violation of the Fourteenth Amendment to the Federal Constitution and thereby makes said statute void.

In order to fully understand the problem involved and the requirements in an Illinois eminent domain proceeding, the statute and cases construing it must be considered.

The Eminent Domain Act of Illinois (Chapt. 47, Ill. Rev. Stat. S. H., Vol. 1) under Section 1, requires the petition

to name the owners of record and if unknown to state the fact.

Section 9 of the act provides the jury shall report in writing.

Section 10 requires the trial judge to enter a judgment on the report of the jury determining ownership, or in case of conflict, to leave it to future determination, and upon payment of full compensation to permit the use of the property. This section requires the trial judge to enter a judgment based on the pleadings and issues joined (Secs. 1-9-10, Appendix E, Pg. A-39).

Section 14, the section in question permits compensation to be paid to the county treasurer (Appendix E, Pg. A-40).

Under said statute the trial court can determine title preliminary to the ascertaining of compensation (Chi. Housing Authority v. Cooper, 19 Ill. App. 2d 441-4, 154 N. E. 2d 308; City of Chicago v. Gage, 268 Ill. 232, 109 N. E. 28; Forest Preserve Dist. v. Christopher, 321 Ill. App. 91, 52 N. E. 2d 313).

Where, as in the case at bar, the trial court has determined title preliminary to the ascertainment of compensation, the money deposited with the county treasurer **is held for the owners and parties interested as found by the trial court** (Convers v. Atchison, Topeka and Santa Fe Railroad Co., 142 U. S. 671; County of Cook v. Vander Wolf, 394 Ill. 521, 528-9, 69 N. E. 2d 25[illegible]).

In **Convers v. Atchison, T. & S. Co.**, 142 U. S. 671, the court, in speaking of the eminent domain act of Illinois and Section 14 of said act, held on page 676:

> "These sections make it clear that under the pleadings the judgment entered upon this report or verdict should either have directed payment to the plaintiff, or that the deposit with the county treasurer was for

his benefit. In other words, Convers' right to this money should have been settled by the judgment, and not left open to further inquiry."

The **Convers** holding was considered and applied in **County of Cook v. Vander Wolf**, 394 Ill. 521, 528-9, 69 N. E. 2d 256, wherein the Illinois Supreme Court on pages 528 and 529 held:

> "It would be against public policy and contrary to the spirit and intent of the constitutional and statutory provisions concerning the right of eminent domain to hold that the public use of the property must be delayed until all interests in the property have been ascertained and the proper distribution of the compensation money definitely determined. **In cases, however, where no dispute or issue is raised in the pleadings as to the fact or extent of the title or interest of a defendant asking judgment in his favor on the verdict, then under the Eminent Domain Act of this state, no proof of the claimant's title is necessary and the condemnation judgment entered should either direct payment to the claimant or that compensation be deposited with the county treasurer for his benefit and should not leave his right to the money open to further inquiry** (Convers v. Atchison, Topeka & Santa Fe Railroad Co., 142 U. S. 671, 12 S. Ct. 351)."

It is only where questions of title are raised in the petition, or raised by defendants, and postponement of the determination of such questions are ordered by the trial court for further judicial determination that under Section 14 of the Eminent Domain Act, the money may be paid to the county treasurer to be held by him in trust for the owners and interested parties, as later determined in a judicial proceeding. (County of Cook v. Vander Wolf, 394 Ill. 521, 69 N. E. 2d 256; Forest Preserve Dist. of Cook

County v. Chi. Title & Trust Co., 351 Ill. 48, 55, 183 N. E. 819; City of Chicago v. Gage, 268 Ill. 232, 239, 109 N. E. 28 Yellow Cab Co. v. Howard, 243 Ill. App. 263, 275-6; Chicago in Trust for Use of Schools v. Fischer, 52 Ill. App. 2d 55, 58-9, 60, 201 N. E. 2d 660.)

This principle is clearly set forth in the two decisions cited by the Supreme Court of Illinois in its modified opinion, and instead of sustaining said opinion, said decisions are directly contrary to it.

In **City of Chicago v. Gage**, 268 Ill. 232, the Illinois Supreme Court states the rule in simple language wherein the court, on page 239, held:

> **"If the conflicting claims are not presented before the jury trial the parties should be required to present their claims to the fund in the hands of the county treasurer."**

The only time payment to the county treasurer protects a condemnor is where the trial court **has not determined title** and has, by order, left the title dispute to a future judicial determination. The principle being, that the condemnor may proceed without waiting for conflicting interests to be determined.

It can be seen from the reading of the statute and cases construing it, that a judicial determination is required by the court to protect the payment of compensation to the owners, that the trial court can adjudicate the title before the jury hearing, or if in doubt, leave it open for future judicial determination; but, a court of competent jurisdiction must, in any direct payment to the county treasurer, by a judgment protect the owners so as to secure the payment of compensation to them.

IV.

The Supreme Court of Illinois Holds That Although Appellant Had a Vested Remainder Interest, a Fee Interest, the Payment of Compensation to the County Treasurer Was All Appellees Were Required to Do. This Completely Ignores the Trial Court Proceeding and the Issue Created by the Pleadings.

If the deposit to the county treasurer is not in conformity to any judicial adjudication, then the interpretation of such statute makes said statute void, because the county treasurer could not perform a judicial function in determining who was entitled to the compensation.

In **Peo. v. Smith,** 374 Ill. 286, the court, on page 288, held: (29 N.E.2d.274).

> "Our holding in People v. Kingery, 369 Ill. 289, demonstrates conclusively that plaintiff is entitled to have this judgment reversed, unless the 1939 statute referred to is constitutional. Section 13 of Article 2 of the Illinois Constitution makes **absolute** the right of a land owner to damages whenever his property is taken or damaged for public use. It makes no difference whether the damages are ascertained before or after the injury is inflicted. This is a vested property right. Ettor v. Tacoma, 228 U. S. 148, 157, 57 L. Ed. 773, 779."

and on page 289 held:

> "On the pretense that a particular statute amounts only to a change of remedy, **the legislature cannot subject a right such as this to chance and make the payment uncertain and problematical** . . . The plaintiff contends the 1939 act violates Section 12 of Article 6 of our constitution in that it divests constitutional courts of jurisdiction over a judicial matter."

and on page 291 held:

> "Whether or not the state could provide a different and additional mode to ascertain compensation either

for land taken or consequential damages is immaterial, **since this is a matter that is judicial in character and it cannot deprive constitutional courts of their jurisdiction over judicial matters.**''

When the trial court originally determined appellant had no compensable right, it barred him from any further consideration as to compensation. The Supreme Court of Illinois, by so construing the application of the said statute, would permit a determination of his interest without his being able to participate in a determination of his rights. (City of Chicago v. Pick, 251 Ill. 594, 598-9, 96 N. E. 539.)

Since the trial court originally ordered the money paid to the trustees under the will, where is the absolute payment to him as a vested remainderman in fee?

The Supreme Court says he is a vested remainderman in fee, but the Supreme Court has not said wherein the absolute payment to him for his interest has been made, secured or protected for him.

It is obvious that the Illinois Supreme Court has overlooked not only the issues in the case at bar but also the provision of Section 10 of the Eminent Domain Act requiring the trial court to enter a judgment, before possession can be taken, which would require an absolute guarantee of compensation to appellant who is conceded to be a vested remainderman.

V.

The Intent of Section 14 of the Act of 1953 Is Best Expressed by Its Amendment in 1955 Which Provides:

Illinois Revised Statutes, Eminent Domain, Chap. 47, Sec. 14, 1955 (See Appendix E, page A-39, infra):

The first part of the section, ''Who shall, on demand, pay to the party entitled thereto'' . . . means the persons

already found to be entitled to the compensation, and the second part speaks of conflicting claims which will be determined by the trial court and, a payment by order of that court, after the determination of such claims, shall be a full acquittance to the county treasurer.

VI.

Effect of Proceedings and Issues in the Trial Court.

Appellant was in court, if at all, on service by publication. Appellees had no knowledge where he was, and stated in the affidavit for publication the following:

> "That the said defendant, Harold William Kronsbein, formerly lived and resided with his mother at 2406 Nameoki Road, Granite City, Illinois, but has long since moved from there and on due inquiry, cannot be found, and his present place of residence is unknown, and that upon diligent inquiry, his place of residence cannot be ascertained" (Abs. of Rec. in Su. Ct. Ill., pgs. 9-10, Trans. of Rec. 3).

Appellees could have alleged in their petition that the title was in dispute, but this they chose not to do. The trial court, as stated, found the trustees to be owners, ordered the total compensation paid to the trustees without any protection of the interest of the appellant (Statement page 10, supra).

If appellant was personally in court, and a proper issue was raised by him as to his title, then the trial court could have determined the dispute, but appellant was not personally in court and no one could represent him, as was done in this case (Sup. Ct. Opinion, Appendix, Pg. A-2). The trial court in the original proceeding erroneously determined appellant's title on appellees' petition, the void answer of appellant and on evidence submitted solely by appellees, and as such, the judgment was void as to him.

It is admitted that the appellate court was correct in its holdings, that eminent domain is a special statutory proceeding, that appellant was not required to prove his title, that appellees were bound by their petition and determination of title and proceeded at their peril, and that appellant was not bound by the determination of the title (Statement, pg. 13, supra).

When the trial court found that the trustees under the will were vested with the title, then appellant could not have participated further in the proceeding even if he were in court, and any subsequent orders would be a nullity as to him. (City of Chicago v. Pick, 251 Ill. 594, 598-9, 96 N. E. 539.)

In the answer, filed by the trustees and Frieda M. Kronsbein, they joined issue by denying the allegations as to the title alleged in the petition as to them, but together with appellant, admitted that the interest of the appellant was a contingent remainderman (Statement, pg. 9, supra). Since no one had a right to so answer for appellant, any orders adjudicating his interests were void which was held by the trial in vacating its judgments, and by the Appellate and Supreme Courts of Illinois.

It is admitted and, was so found by the Appellate Court, that the trial court, in the original condemnation proceeding, made an erroneous determination of title to the property involved; that appellees are bound by said determination, that appellant was not required to prove title, and that the only persons that were paid compensation were the life tenants (Statement, pg. 13, supra).

The trial court in finding title in the life tenants, as owners, could only direct payment to said life tenants; and the deposit with the county treasurer could only be for the benefit of the said owners as found by the court. (Convers v. Atchison, Topeka & Santa Fe R. Co., id.; County of Cook v. Vander Wolf, id.)

This is borne out by the payment of said compensation outright to the trustees under the will, on their petition, and by the order of the trial court (Statement, pg. 11, supra).

Appellees alleged the interest of appellant to be a contingent interest, and in all of the courts they stated that appellant had no interest, and summed up their whole claim when they asserted in the Appellate Court the following:

> "It is apparent **that the parties and the court,** in the condemnation proceeding recognized that Harold William Kronsbein was not a necessary party to that suit because **at the conclusion of the proceeding the entire award of compensation for the property was ordered paid to the trustees**" (Appellees' brief, pg. ..., Trans, of Rec. ...), Statement, pg. 12, supra).

Appellees were chargeable with knowledge of the law, and are chargeable with notice of whatever is shown by the record as to title, and when they failed to resolve the title corrrectly, they acquired no better title than they alleged. (Clark v. Leavitt, 335 Ill. 184, 190-1-2, 166 N. E. 538.)

Appellees by proceeding against appellant, **who was not personally in court** and failing to have his title correctly determined, **proceeded at their peril,** and the payment to a now admitted life tenant does not affect appellant's interest which was never acquired. (South Park Com'rs. v. Todd, 112 Ill. 379, 382-3; Bartlow v. Chi., B. & Q. R. R. Co., 243 Ill. 332, 336, 90 N. E. 721—Appellate Court Opinion, Appendix C, pg. 22.)

Thus the Supreme Court of Illinois, in applying said Section 14 of the statute to the circumstances of the case at bar, has denied appellant due process in that, it has permitted compensation to be paid solely to a life tenant and the taking of his property without payment of just

compensation to him and, such an application of said statute would be void to him as in violation of the fourteenth amendment to the federal constitution.

With these admitted rules of Illinois law, as applied to the circumstances of the case at bar, as to appellant, it was clearly shown that the original orders and judgment of the trial court were void as to appellant, and it was further admitted that payment of all of the compensation to a life tenant could not affect the appellant, and, that the trial and appellate courts were correct in setting aside said judgment.

The Supreme Court, in reversing the appellate and trial courts, has completely disregarded the admitted holdings of the Appellate Court, and has held, in effect, that the interest of appellant is a contingent remainder, because the net result is to reinstate the original orders and judgments of the trial court, and to compel defendant to be bound thereby. This the court has done by the application of said Section 14 of the Eminent Domain Act, and denies just compensation to appellant, because all of the compensation was paid to a life tenant which is clearly in violation of the fourteenth amendment to the Constitution of the United States in denying due process to appellant.

VII.

Constitutional Guarantees.

A.

Application of the due process clause of the fourteenth amendment to the federal constitution.

The Fourteenth Amendment to the Constitution of the United States provides:

> "nor shall any State deprive any person of life, liberty, or property without due process of law."

1.

Said amendment applies to a state condemnation proceeding.

2.

The final judgment of a state court is deemed the act of the State.

3.

Compensation must be made or adequately secured to the owner.

4.

That even if a defendant defends, the mere form of the proceeding cannot convert the process used into due process if the necessary result is to deprive the owner of his property without compensation.

In the case of **C. B. & Q. Ry. v. Chicago**, 166 U. S. 226, a case reviewed under a condemnation from the State of Illinois in 149 Ill. 457, the Supreme Court had this to say, pages:

> 235: "If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the Act of the State within the meaning of that Amendment.
>
> "It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State."

236: "**The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.**

239: "The conclusion of the court on this question is, that since the adoption of the Fourteenth Amendment **compensation for private property taken for public use constitutes an essential element in 'due process of law,'** and without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution."

241: "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that State of a right secured to the owner by that instrument."

and in the recent Supreme Court case of Malloy v. Hogan, 378 U. S. 1, decided in 1964, on page 4 of the opinion, had this to say:

"Although many Justices have deemed the amendment to incorporate all eight of the amendments, the view which has thus far prevailed dates from the decision in 1897 in C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, which held that the Due Process Clause requires the State to pay just compensation for private property taken for public use."

This opinion of the Supreme Court of the United States holds that it matters not, whether the defendant in a con-

demnation suit was, or was not, in court, or what procedure was followed, if, the defendant was not paid compensation he was denied "due process." **And, further holds, that if the judgment of the state court, even if it be authorized by statute, authorizes the taking of defendant's property without compensation made or secured to the owner is wanting in due process and in violation of a right guaranteed to the defendant by the Fourteenth Amendment to the Constitution of the United States.**

The Supreme Court of Illinois in applying Section 14 of the Eminent Domain Act to appellant's particular circumstances in this case, would make the said statute void under the 14th Amendment to the Constitution of the United States, in that, by the said application it has deprived appellant of his "just compensation" for his property taken by appellees, for the simple reason it is admitted he never received any compensation.

Under the constitution the owner must be adequately safe-guarded as to just compensation.

In **Dept. of Public Works v. Butler**, 13 Ill. 2d 537, 150 N. E. 2d 124, the court on page 547 held:

> "It has been uniformly held in this country, that the compensation need not be paid before the taking,—it is sufficient that provision be made for compensation afterwards, **provided the payments be made certain.**"

and again on pages 547 and 548 held:

> "After an exhaustive study of the authorities, we are of the opinion that Section 13 of Article II of the Illinois Constitution does not prohibit the taking, possession, and use of private property by the State prior to the fixing and payment of compensation **provided, of course,** that **the authorizing statute safe-**

> **guards the right of the owner of such property to just compensation therefor."**

and on page 548 held:

> "It has been almost universally held in this country that the taking by a condemnor does not contravene due process merely because it precedes the ascertainment of what constitutes just compensation, **provided that the owner be given adequate assurance of payment thereof."**

The constitutional guarantee of just compensation is self executing, it requires no legislation for its enforcement, and is not susceptible of impairment by legislation (Peo. v. Kelly, 361 Ill. 54, 196 N. E. 795; Cohen v. City of Chicago, 377 Ill. 221, 229, 36 N. E. 2d 220).

It has long been the established law that the legislature cannot deprive a citizen of a vested right by a mere legislative act. Peo. v. Clark, 283 Ill. 221, 225, 119 N. E. 329; Dobbins v. First Nat. Bank of Peoria, 112 Ill. 553, 562; Peo. v. Lindheimer, 371 Ill. 367, 372, 21 N. E. 2d 318. The effect of the statute, as applied by the Illinois Supreme Court, is to deprive appellant of his vested right.

It is submitted that the decision of the Supreme Court of Illinois failed to take into consideration the particular circumstances of the record insofar as appellant is concerned, and, applied the statute to appellant, as if no judgment had been entered as to title by the trial court, preliminary to determining compensation, and by application of said statute makes it void under the Fourteenth Amendment to the Constitution, and that the order and judgment of the Supreme Court of the State of Illinois be reversed and the judgments of the Appellate Court and trial court be affirmed.

B.

Issues not raised in trial or appellate courts could not be considered in the Supreme Court of Illinois.

Appellees raised no point under said Section 14 of the Eminent Domain Act in any of the proceedings.

In so doing, the Supreme Court of Illinois could not consider such a point. (Rule 39 of the Illinois Supreme Court, Chapt. 110, Sec. 101.39, S. H. Ill. Rev. Stat., Vol. 2; Peo. ex rel. Carpentier v. Treloar, 13 Ill. 2d 596, 601; 150 N. E. 2d 624; Crane Construction Co. v. Symons Co., 25 Ill. 2d 521, 527; 185 N. E. 2d 139).

The same rule applies in the Appellate Court of Illinois. (Chapt. 110, Sec. 201.7, S. H. Ill. Rev. Stat., Vol. 2).

Appellees' statement, brief and argument in the Appellate Court has been made a part of the record to show no such point was raised (Trans. of Rec. Pg. 7).

Appellant, in the Supreme Court of Illinois, was only required to defend against points and issues presented. (Mueller v. Elm Park Hotel Co., 391 Ill. 391-8-9; 63 N. E. 2d 365).

The Appellate Court held against appellees on all of the points raised in said court, and made specific holdings which were not contested or reversed by the Supreme Court (Statement, Pgs. 13-14, supra).

With these admitted holdings, the Supreme Court of Illinois has proceeded to consider points not raised in the Appellate Court, and to disregard said holdings.

The Supreme Court of Illinois, in considering said Section 14, has denied appellant due process in violation of the fourteenth amendment to the federal constitution. Appellant was entitled to have his case heard in the Supreme

Court of Illinois, as the case was tried and on the issues presented in the lower courts. (Cole v. Arkansas, 333 U. S. 196, 201; Bouie v. City of Columbia, 378 U. S. 347, 354; Williams v. Georgia, 349 U. S. 375, 383).

IN CONCLUSION.

It is respectfully submitted that this is a case of substantial importance, in that appellant has been deprived of his property without any compensation. Further it is a case of general importance, because, if the judgment of the Supreme Court is allowed to stand, any owner could be deprived of his property in an Illinois conden nation without due process. The Supreme Court of Illinois, in violating due process by its judgment, makes the eminent domain statute void, and has overruled all of the cases in Illinois on the subject. The case at bar requires plenary consideration be given by this court, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

KENNETH F. KELLY,
1308a Niedringhaus Avenue,
Granite City, Illinois,

McGLYNN & McGLYNN,

(ROBERT E. McGLYNN),
120 North Main Street,
East St. Louis, Illinois,
Attorneys for Appellant,
Harold William Kronsbein.

BLANK
PAGE

APPENDICES.

No. Page

A. Opinion of the Supreme Court of Illinois, dated November 19, 1965 ..... A-1-5

B. Modified opinion of the Supreme Court of Illinois, dated January 26, 1966 ..... A-6-8

C. Opinion of the Appellate Court, Fifth District of Illinois A-9-22

D. Opinion of the trial court A-23-38

E. Pertinent Sections of the Eminent Domain Act of Illinois A-39-41

BLANK PAGE

APPENDIX A.

In the Supreme Court of Illinois.

(No. 39183—Judgments Reversed.)

The Trustees of Schools of Township Three (3) Range Nine (9) West of the Third Principal Meridian, in Madison County, Illinois, etc, et al., v. Harold William Kronsbein, et al.

Opinion filed November 19, 1965—Rehearing denied January 24, 1966.

Appeal from Appellate Court Fifth District.

Docket No. 39183—Agenda 34—September, 1965.

Trustees of Schools, etc., Appellants, v. W. J. Steele et al. —(Harold William Kronsbein, Appellee.)

Mr. Justice Schaefer delivered the opinion of the court:

In 1953 the plaintiffs, township school trustees in Madison County, filed an eminent domain petition to acquire certain land for school purposes. A jury determined just compensation for the property and on November 23, 1953, judgment was entered upon the jury's award. Pursuant to the court's order, the amount of the award was paid to the county treasurer, and possession of the property was taken. A junior high school building was erected upon a part of the land taken, and the balance was improved with athletic facilities. On November 10, 1960, Harold William Kronsbein (hereafter defendant) filed a motion to vacate

the judgment on the ground that no jurisdiction over him was ever acquired in the eminent domain proceeding, and that the judgment entered in that proceeding was void as to him. Three years later an order was entered setting aside the judgment of November 23, 1953, as to the defendant. On the plaintiffs' appeal the appellate court affirmed (54 Ill. App. 2d 337), and we allowed leave to appeal.

The defendant's interest in the property in question arose under the will of his grandfather, which devised the land in question to trustees to pay the income to the defendant's mother for life, and provided that upon her death the land should go to her issue. The defendant was her only child, and the appellate court held that he was the owner of a vested remainder interest in the property, subject to the life estate in the trustees for the benefit of his mother. This determination is not contested in this court.

In the eminent domain proceeding a summons directed to the defendant was left with his mother at her residence in an attempt to effect "abode" service as authorized by section 13 of the Civil Practice Act (Ill. Rev. Stat. 1953, chap. 110, par. 137), but it is conceded that he did not at that time reside with his mother, and so jurisdiction was not secured by that method. An answer was filed on behalf of the defendant by attorney Joseph C. Steele, but at the hearing upon the motion to vacate both Joseph C. Steele and the defendant testified that Steele was not authorized to represent the defendant in the eminent domain proceeding. Whatever other consequences may flow from the unauthorized answer, it did not give the court jurisdiction over the defendant.

Notice by publication was also directed to the defendant under section 14 of the Civil Practice Act (Ill. Rev. Stat. 1953, chap. 110, par. 138). The affidavit upon which publication was based was filed by the attorney who then represented the plaintiffs. With respect to the defendant it

recited: "That the said defendant, Harold William Kronsbein, formerly lived and resided with his mother at 2406 Nameoki Road, Granite City, Illinois, but has long since moved from there and on due inquiry, cannot be found, and his present place of residence is unknown, and that upon diligent inquiry, his place of residence cannot be ascertained."

The defendant does not deny that notice was published in the manner and for the time required by the statute. He contends, however, and the trial and appellate courts accepted the contention, that the published notice was ineffective because the affidavit did not comply with the provisions of the statute.

Section 14 of the Civil Practice Act, as it read when the eminent domain proceeding was before the trial court, provided: "Whenever, in any civil action affecting property or status within the jurisdiction of the Court, * * * plaintiff or his attorney shall file, at the office of the Clerk of the court in which his suit is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the Clerk shall cause publication to be made * * *." Ill. Rev. Stat. 1953, chap. 110, par. 138.

The contention that notice by publication did not confer jurisdiction over the defendant is based upon the fact that the affidavit for publication does not contain the words "so that process cannot be served upon him." It is asserted that the omission of this clause deprived the court of jurisdiction. The trial and appellate courts were persuaded to this view by the language used by this court in **Albrecht v. Hittle**, 248 Ill. 72, 73-74: "The principal objec-

tion to the affidavit is that it did not state that proces could not be served upon the defendants. It stated tha they were not residents of this State, and that the affian was informed and believed that they resided at certai places therein named, in other States. If a defendant not a resident of this State it is not necessary to say tha he cannot be served with process, and in this case th summons issued to the sheriff was returned not found a to the three defendants. The provision of the statute fo stating that process cannot be served upon a defendan relates only to one who is concealed within the State or o due inquiry cannot be found."

In **Albrecht v. Hittle** the court was concerned only wit service by publication upon a nonresident, and what wa said with respect to other matters was dictum. As applie to a situation in which a defendant "on due inquiry can not be found," the omitted clause is redundant, for follows as a necessary consequence that process cannot b served upon such a defendant. Of the several situation in which the statute authorizes service by publication, th omitted clause has least relevance to that in which th defendant on due inquiry cannot be found. One wh resides or has gone out of the state might neverthele work within the state, or otherwise come regularly withi the state so that personal service could be had. And a applied to one who is concealed within the state, the claus "so that process cannot be served upon him" might rea sonably be thought to describe the requisite quality o degree of concealment. But in the situation in the presen case, in which published notice was based upon a swor statement that on due inquiry the defendant could not b found, the omitted clause would have added nothing t what had already been said. To insist upon its presenc would be to require an empty formality. We hold ther fore that the trial court had jurisdiction over the defen ant in the eminent domain proceeding.

The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was therefore unaffected. In fact, however, the compensation awarded by the jury was deposited with the county treasurer pursuant to an order entered by the court. The disposition thereafter made of the money so deposited cannot affect the rights of the condemnors. The defendant also asserts that "[T]he value of the property as fixed by the jury was based on a stipulation of an attorney, who had no authority to represent, or bind this defendant, and, was not based upon evidence heard in an adversary proceeding." This assertion is based upon a misapprehension of the record, which shows that the jury found that the value of the land taken was $58,893. The stipulation to which the defendant refers was entered into between the trustees under the will of the defendant's grandfather and a tenant who was farming the land under a five-year lease. The tenant agreed to relinquish his interest under the lease and vacate the premises upon the payment of $4,000 to him by said trustees. No right of the defendant was prejudiced by the stipulation.

The judgments of the appellate and circuit courts are reversed.

Judgments reversed.

APPENDIX B.

Office of
Clerk of the Supreme Court
State of Illinois
Springfield

January 26, 1966

Messrs. Listeman, Bandy & Hamilton
Attorneys at Law
316 Missouri Avenue
East St. Louis, Illinois

In re: The Trustees of Schools of Township Three (3), etc., et al. v. W. J. Steele, et al.,—No. 39,183.

Gentlemen:

This office has today received from the Reporter of Decisions, page three and the last page of the opinion concerning the above entitled cause which were modified upon denial of petition for rehearing.

I am enclosing a copy of each page as modified.

Very truly yours,
Clerk of the Supreme Court.

EBS:cr

Encs.

cc—Mr. Kenneth F. Kelly

(Modified pages 3 and 4 of the Original Opinion.)

named, in other States. If a defendant is not a resident of this State it is not necessary to say that he cannot be served with process, and in this case the summons issued to the sheriff was returned not found as to the three de-

fendants. The provision of the statute for stating that process cannot be served upon a defendant relates only to one who is concealed within the State or on due inquiry cannot be found."

In **Albrecht v. Hittle** the court was concerned only with service by publication upon a nonresident, and what was said with respect to other matters was *dictum.* As applied to a situation in which a defendant "on due inquiry cannot be found," the omitted clause is redundant, for it follows as a necessary consequence that process cannot be served upon such a defendant. Of the several situations in which the statute authorizes service by publication, the omitted clause has at least relevance to that in which the defendant on due inquiry cannot be found. One who resides or has gone out of the state might nevertheless work within the state, or otherwise come regularly within the state so that personal service could be had. And as applied to one who is concealed within the state, the clause "so that process cannot be served upon him" might reasonably be thought to describe the requisite quality or degree of concealment. But in the situation in the present case, in which published notice was based upon a sworn statement that on due inquiry the defendant could not be found, the omitted clause would have added nothing to what had already been said. To insist upon its presence would be to require an empty formality. We hold therefore that the trial court had jurisdiction over the defendant in the eminent domain proceeding.

"The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was therefore unaffected. In fact, however, the compensation awarded by the jury was, in accordance with section 14 of the Eminent Domain Act (Ill. Rev. Stat. 1953, chap. 47, par. 14), by order of the court deposited with the county treasurer 'for the benefit

of the owners of, and parties interested in said tract of land.' The disposition thereafter made of the money so deposited cannot affect the rights of the condemnors. (**Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co.**, 351 Ill. 48, 55; **County of Cook v. Vander Wolf**, 394 Ill. 521, 528.)'' The defendant also asserts that ''[T]he value of the property as fixed by the jury was based on a stipulation of an attorney, who had no authority to represent, or bind this defendant, and, was not based upon evidence heard in an adversary proceeding.'' This assertion is based upon a misapprehension of the record, which shows that the jury found that the value of the land taken was $58,893. The stipulation to which the defendant refers was entered into between the trustees under the will of the defendant's grandfather and a tenant who was farming the land under a five-year lease. The tenant agreed to relinquish his interest under the lease and vacate the premises upon the payment of $4,000 to him by said trustees. No right of the defendant was prejudiced by the stipulation.

The judgments of the appellate and circuit courts are reversed.

Judgments Reversed

APPENDIX C.

In the Appellate Court, Fifth
District of Illinois.

The Trustees of Schools of Township Three (3) Range Nine (9) West of the Third Principal Meridian, in Madison County, Illinois, etc. et al. v. Harold William Kronsbein, et al.

Opinion filed January 2, 1964.

Appeal from the Circuit Court of Madison County, Illinois.

Dove, P. J.

On November 10, 1960, Harold William Kronsbein filed, in the County Court of Madison County, a petition which sought to vacate two judgment orders previously entered in a condemnation proceeding which originated in that court on August 13, 1953. A hearing upon that petition resulted in an order entered August 2, 1963, which found that the petitioner, Harold William Kronsbein, had a vested interest in the condemned premises at the time the petition to condemn was filed; that the court, in the condemnation proceeding, never acquired jurisdiction of his person, and therefore, the judgments as to him were null and void, and said judgments were vacated and set aside. A motion to vacate this order of August 2, 1963, was filed by the trustees and denied on December 26, 1963, and this appeal by the school trustees followed.

The condemnation petition filed on August 13, 1953, alleged that Henry Fehling, at the time of his death, was seized in fee simple of the property sought to be con-

demned, and averred his death, and the admission of his will to probate in Madison County, Illinois. It was then alleged that Mrs. Minnie Rode and Fred Lueders were trustees of the premises; that they are both deceased, and that W. J. Steele and Ivy Steele are the duly appointed, qualified and acting trustees of the above-described tract of land, and now hold the same for the benefit, during her lifetime, of Freida M. Kronsbein, nee Freida M. Fehling, defendant herein.

The petition then alleged that Harold William Kronsbein has a certain interest in said real estate under said will, which, by its terms, gave and devised the premises involved in this proceeding, after the death of Freida M. Fehling to her issue, and that Harold William Kronsbein is the son and sole issue of Freida M. Kronsbein. The petition then alleged that Harold William Kronsbein, Frederick Lester Fehling, Amos H. Rode, Esther A. Clemons, Henry E. Lueders, Wesley A. Lueders, and Conrad C. Lueders are all grandchildren of Henry Fehling, and that they have some interest in the described premises in the nature of a contingent remainder. The petition made W. J. Steele, Ivy Steele, Freida M. Kronsbein, Harold William Kronsbein, and the other named grandchildren of Henry Fehling, parties defendant.

Upon the filing of the petition for condemnation on August 13, 1953, the attorney for the petitioners filed an affidavit which recited that the defendant, "Harold William Kronsbein formerly lived and resided with his mother at 2406 Nameoki Road, Granite City, Illinois, but has long since moved from there, and on due inquiry, cannot be found, and his present place of residence is unknown, and that upon diligent inquiry, his place of residence cannot be ascertained." Upon this affidavit a publication notice was published in the Granite City Press Record on August 17, 20, 27, and 31, 1953. A summons was issued out of the office of the County Clerk of Madison

County directed to the defendants. As to service on appellee, the Sheriff's return, dated August 18, 1953, is as follows: "I have duly served the said summons on the defendant Harold William Kronsbein, on the 17th day of August, 1953, by leaving a copy of said summons on said date at his usual place of abode with Freida M. Kronsbein, a person of the family of said Harold William Kronsbein, of the age of ten years or upwards, and by informing such person with whom said summons was left of the contents thereof, and by also sending a copy of said summons on the 18th day of August, 1953, in a sealed envelope, with postage fully prepaid, addressed to said defendant, Harold William Kronsbein, 2406 Nameoki Road, Granite City, Illinois, at his usual place of abode. As the Sheriff, I hereby certify that I did, on the 18th day of August 1953, send a copy of said summons in a sealed envelope with postage fully prepaid, addressed to said defendant, Harold William Kronsbein, at his usual place of abode, as stated hereinabove in my return."

On September 23, 1953, J. C. Steele, as attorney for W. J. Steele, Ivy Steele, trustees, Freida M. Kronsbein and Harold William Kronsbein, filed an instrument designated as an answer in said condemnation proceeding. This answer, although improper in this proceeding (Dept. of Public Works v. Lewis, 344 Ill. 253, 255), admitted most of the allegations of the petition, and concluded by averring that as trustees under the will of Henry Fehling, these defendants have no right to enter into any agreement for the sale of the premises sought to be condemned.

On November 2, 1953, upon this record an order was entered in this proceeding, which found, among other things, that the court had jurisdiction of all the parties and subject matter of the proceeding; that the described property was not in excess of what was actually needed for school purposes; that the petitioners have complied with all applicable provisions of the statute, and have

made the required preliminary proof entitling petitioners to a judgment for the condemnation of the described tract of land. This order directed that the matter of ascertaining the amount of just compensation to be paid the owners be submitted to a jury.

The following day the jury found the premises sought to be condemned contained 35.16 acres, and fixed the amount of compensation to be paid the owners at $58,893.00. On November 23, 1953, judgment was entered on this verdict, which directed, among other things, that within thirty days from the date of the order, petitioners should pay this amount to the County Treasurer of Madison County for the benefit of the owners of the tract, W. J. Steele and Ivy Steele, trustees under the last will and testament of the late Henry Fehling; that upon such payment, the petitioners should have the right to enter upon the described premises. On December 23, 1953, upon the petition of the said W. J. Steele and Ivy Steele, who represented themselves to be the trustees under the last will and testament of Henry Fehling, deceased, the court entered an order directing the County Treasurer to pay said sum of $58,893.00 to them as trustees, and thereafter they received this amount and receipted the County Treasurer therefor.

With the record in this condition the defendant, Harold William Kronsbein, filed, on November 10, 1960, his verified motion to vacate the judgment entered on November 23, 1953. This motion made a certified copy of the last will of Henry Fehling a part thereof, and averred that he was the owner of the condemned premises which were held in trust for his mother during her lifetime. He alleged that no service had been had upon him in the condemnation proceeding, either personal or by publication, and that the attorney who filed an answer for him, had no authority to do so, and concluded that the court had no jurisdiction over his person.

To this motion counsel for appellants filed his affidavit denying the several allegations of the motion, and specifically denying that Harold William Kronsbein was not duly represented in said proceeding by Joseph C. Steele, attorney, and denying also that he was not duly served with notice of the pendency of this proceeding by publication according to the statutes of this state then in effect.

Upon the hearing in the trial court, Harold William Kronsbein testified that he was born on September 19, 1917; that he is a grandson of Henry Fehling, deceased, and the son and only child and issue of Freida Fehling Kronsbein; that his father, John Kronsbein, died in October, 1951, and his mother, Freida Fehling Kronsbein, is living and resides at 2412 Madison Avenue, Granite City; that at the time of his father's death, he was married and living in St. Louis, Missouri; that he was subsequently divorced, and in the fall of 1952, he went to Chicago, Illinois, where he was employed in a restaurant and remained there until the summer of 1957, when he went to Los Angeles, and from there came to Granite City in October, 1957; that he never resided at 2406 Nameoki Road, Granite City, Illinois, and he had no knowledge that his mother ever lived there, and he never, at any time prior to the fall of 1957, knew or was advised of the condemnation proceeding; that he knew J. C. Steele, whom he identified as an attorney present at the hearing of his motion; that he did not employ or authorize him to represent him in any legal matters, and had not authorized him to file any answer in the condemnation proceeding for or on his behalf, and never authorized his mother to represent him in any legal matters. He further testified that on October 13, 1960, he discussed the condemnation proceeding with his attorney and then learned, for the first time, that a pleading had been filed on his behalf.

The only other witness who testified upon the hearing of the motion to vacate was Joseph C. Steele. He testi-

fied that he lived in Granite City, and had practiced law for many years, knew Harold W. Kronsbein, and had been acquainted with him prior to August, 1953; that on September 21, 1953, he prepared and filed an answer in this cause on behalf of his brother, W. J. Steele and Ivy Steele, trustees under the will of Henry Fehling, deceased, and on behalf of Freida Kronsbein and Harold W. Kronsbein; that Harold W. Kronsbein did not employ him to do so, or employ him to represent him in this proceeding; that he had not seen Harold W. Kronsbein since the fall of 1951, and knew he had left the area at that time. This witness further testified that he knew the affidavits of Mr. Faulkner, the attorney for petitioner in this proceeding, were on file "claiming they hadn't gotten service, and his mother asked me to file this (answer) on behalf of Harold, and that is why I did so."

Counsel for appellant insists that the legal title to the condemned property was, by virtue of the provisions of the will of Henry Fehling, vested in W. J. Steele and Ivy Steele, trustees; that they were made parties and the court acquired jurisdiction over their persons and they represented all the heirs of Henry Fehling mentioned in his will; that Harold William Kronsbein had only a contingent interest in the premises involved and was, therefore, not an indispensable party to the proceeding. It is also insisted that the court acquired jurisdiction of Harold William Kronsbein, and regardless of any other issues, appellee is barred from obtaining any relief because of laches.

To sustain the judgment order appealed from, counsel for appellee insists that Harold William Kronsbein, at the time this petition to condemn was filed, was a necessary and indispensable party thereto, as he had a vested remainder interest in fee in the property sought to be condemned, subject only to the life estate of the trustees for the life of his mother, with the right to possession in

appellee at the time of his mother's death; that the court never acquired jurisdiction of his person, and therefore the proceeding, as to him, was void.

The land involved in this proceeding was disposed of under Articles Five, Six, Ten and Eleven of the will of Henry Fehling, which was admitted to probate on September 12, 1910, and a certified copy thereof was attached to the motion filed by appellee on November 10, 1960, to vacate the previous judgment.

These Articles are as follows:

"**Article Five:** I hereby give, devise and bequeath all the residue and remainder of my estate, real, personal or mixed, whereof I may be seized or possessed, or to which I may in any manner be entitled, or in which I may be interested at the time of my death, unto my executors and trustees hereinafter named, and to their heirs and assigns forever, in trust, nevertheless, as follows:

Article Six: I direct that my said executors and trustees shall let or lease the said real estate and keep the improvements thereon in good repair, and after the payment of taxes, repairs and improvements, and other necessary expenses, the balance should be paid out and expended by my said executors and trustees as hereinafter more particularly set forth. In no case shall this will be construed so as to authorize or empower said executors and trustees to sell or encumber said real estate.

Article Ten: I further direct that all profits, interest and income received by my said executors and trustees from the following described real estate, (describing the premises here involved with other lands), and also the profits, interest and income received by my said executors and trustees from one-half of my personal or

mixed estate, after deducting taxes, money laid out for repairs and improvements, commissions, and all necessary expenses incident to this trust, shall during the life of my daughter, Freida M. Fehling, be paid annually by my said executors and trustees to my daughter, Freida M. Fehling, and her receipt for such payment shall be a full and sufficient acquittance and discharge of my said executors and trustees.

Article Eleven: Upon the death of my said daughter, Freida M. Fehling, or if she shall die before me, I hereby give, devise and bequeath all the real estate described in Article Ten of this will, and also one-half of all my personal or mixed estate unto her issue, if any, and if none, then to my grandchildren, whoever they may be, share and share alike, to them, their heirs and assigns forever."

In an Eminent Domain proceeding, the plaintiff is required at its peril, to ascertain and name in the petition the true owner of the land sought to be condemned and taken, and the person so named as owner in the petition is not required to prove title. Averments of the petition as to the nature or extent of the estate or title of the defendants are not binding on the defendants, but are on the petitioner. (Dept. of Public Works v. Sohm, 315 Ill. 478, 483.)

In Gridley v. Gridley, 399 Ill. 215, the court stated (p. 225): "If an estate is devised to a trustee, the trustee will take only so much of the legal estate as the purposes of the trust require. He will in such case, or even if there be no formal devise, acquire an estate commensurate with the powers conferred and the purposes to be accomplished. If the fee is required it will be taken, and if the trustee will be enabled to execute the trust with a less estate, that alone will vest in him. If a trustee is required to collect and pay the rents of property for a definite period, he will take an estate for years. If he is charged with

such duties for the life of an individual, he will take an estate for the life of that person, and if his duties are of indefinite duration, he will take the fee. Harvey v. Ballard, 252 Ill. 57. In this case the devise to the trustees was 'for the use and benefit of my daughter, Mary, now Mrs. Mary Bell, during her natural life', and it was provided that, 'at the death of the said Mary such trust estate shall cease and be determined'. There was no direction for a conveyance by the trustees upon the expiration of the trust, but the will provided that the fee should vest in the contingent remaindermen without the aid of a conveyance, upon the death of the life tenant. The duties of the trustees were to rent the property, keep it in repair, pay the taxes and assessments, keep the buildings insured, and pay all remaining rents and income into the hands of the life tenant in person. These duties were to terminate with the death of the life tenant, and the trustees were given no power and charged with no duty thereafter. The legal estate devised to the trustees was not an estate in fee, but was a life estate for the life of Mary Gridley Bell. Beal v. Higgins, 303 Ill. 370; Harvey v. Ballard, 252 Ill. 57."

In the instant case, the provisions of the will of Henry Fehling prohibited the trustees from selling or encumbering the property in question. The only duties the trustees had were to rent the property, collect the income therefrom, keep the property in repair, pay taxes, and distribute, annually, the net proceeds to the life beneficiary, Freida M. Kronsbein. The devise to the trustees gave them the legal estate for the lifetime of Freida Kronsbein, but upon her death, the duties of the trustees will terminate. The trustees, therefore, had, at the time the petition to condemn was filed, a life estate for the life of Freida M. Kronsbein in the property sought to be condemned.

The petition for condemnation filed in 1953 did not directly allege that Harold William Kronsbein was the

owner of the fee of the premises sought to be condemned, but did allege that Henry Fehling, at the time of his death, was the owner of the tract sought to be condemned; that his will was duly admitted to probate; that W. J. Steele and Ivy Steele are the duly appointed, qualified and acting trustees and now hold these premises for the benefit, during her lifetime, of Freida M. Kronsbein; that said will devised said premises, on the death of Freida M. Kronsbein to her issue, and that Harold William Kronsbein is the son and issue of Freida M. Kronsbein, and has a certain interest in said real estate under said will. If this "certain" interest, which the petition alleged appellee inherited from his grandfather, was a vested interest, he was an indispensable party to this proceeding.

The Eleventh Article of Henry Fehling's will devised the fee to the premises involved herein to the issue of his daughter, Freida. The word "issue" as a general thing, means lineal descendants indefinitely. When the word "issue" is used in reference to the parent of that issue, as where the issue are to take the share of the deceased parent, it must mean his children, that is, the word "parent" confines the word "issue" to the children of the taker (Arnold v. Alden, 173 Ill. 229, 238, 239). At the time of the death of Henry Fehling, his daughter, Freida Kronsbein, was living. Her son, Harold William Kronsbein, was born in 1917 and is a lineal descendant of the testator. No other conclusion can be arrived at than the word "issue," as used in said Article Eleven of the will of Henry Fehling, meant the child or children of his daughter, Freida. There is nothing in his will to indicate that he used the word issue to mean anything other than "child" or "children." These terms are generally used synonymously (Noth v. Noth, 292 Ill. 536, 542).

The fact that the testator, after having devised an estate for the life of his daughter, Freida M. Kronsbein,

to his trustees, used the words "upon the death of my said daughter," does not make the remainder interest which passed, contingent upon the theory that those in whom the remainder is to vest are not to be ascertained until the death of appellee's mother. These words refer to the time when the remainder is to fall into possession of the remainderman and not to the time when it is to vest (Dyslin v. Wolf, 407 Ill. 532, 541, 542). Where a testator makes a devise to one person for life with remainder to the life tenant's child or issue, the devise vests the remainder interest in the child of the life tenant just as soon as a child is born, subject to the remainder interest being opened to let in any after born child or children of the life tenant (Field v. Peeples, 180 Ill. 376, 381; Whittaker v. Porter, 321 Ill. 368, 377). Under the authorities, appellee had a vested remainder in the land sought to be condemned, possession only being postponed because of the life estate.

There is no merit in appellant's suggestion that the trustees represented all the heirs mentioned in the will of Henry Fehling. The devise to the trustees was for the lifetime of Freida Kronsbein, with the remainder interest vested in appellee. Being the fee owner of the premises sought to be condemned, he, Harold William Kronsbein, was an indispensable party to the proceeding.

There was no valid personal service or valid service by publication on defendant, Harold William Kronsbein, and the unauthorized answer filed by Mr. Joseph Steele, purporting to represent him did not give the court jurisdiction over his person. Where an attorney entering the appearance of a defendant does so without authority, the judgment based on such fact is void. (Bruschke v. Der-Nord Chicago Schuetzen Verein, 145 Ill. 433, 437.) In Anderson v. Hawke, 115 Ill. 32, 3 N. E. 566, an attorney appeared and filed a demurrer on behalf of Mary H. Hawke, a defendant in an attachment proceeding. In a

subsequent creditor's bill based upon the judgment rendered in the former proceeding, Mary H. Hawke filed an answer and cross-bill in which she averred that she had never been served with process, did not appear, and had never authorized any appearance in the attachment proceeding. In sustaining her contention the court said (p. 38): "Where a court renders judgment against a defendant, where the court has no jurisdiction of the person, no argument is needed to prove that such a judgment is void and a creditor's bill could not be predicated on a void judgment. Here, an attorney at law appeared and interposed a demurrer to the declaration. . . . The attorney had no authority whatever from the defendant to appear in the case, and as his acts were entirely unauthorized, what he did could not be binding on her. It would be establishing a dangerous precedent to hold a judgment valid where there had been no service, merely for the reason that an attorney had appeared on his own motion, without authority and filed some sort of a plea, in the case. . . . We are not prepared to hold that a person may have his property taken in satisfaction of a void judgment and be turned over to an insolvent attorney for redress, which might often be the case if a judgment like the one in question could be enforced".

The affidavit upon which the publication notice was based was insufficient. This affidavit stated that defendant, "on due inquiry cannot be found and his present place of residence is unknown, and that upon diligent inquiry, his place of residence cannot be ascertained." The affidavit did not contain the required words "so that process cannot be served upon him". The failure to include such wording made the affidavit fatally defective, and the publication based upon it void (Albrecht v. Hittle, 248 Ill. 72; Anderson v. Anderson, 292 Ill. App. 421). The insufficiency of this type of affidavit is set forth in Nichol's Illinois Civil Practice, where it is stated: "If an affiant

states as his ground for publication that defendant is a non-resident of the state, it is unnecessary to state that he cannot be served with process, since the provision of the statute requiring a statement that process cannot be served upon a defendant relates only to one who is concealed within the state or on due inquiry cannot be found. This is the construction placed by the court upon the statutory words 'so that process cannot be served upon him.' But an affidavit merely stating that upon due and diligent inquiry defendant's place of residence cannot be ascertained, and stating his last known place of residence, is insufficient for failure to show inability to personally serve defendant" (1 Nichol's Illinois Civil Practice, Chap. 24, sec. 644).

The defenses of laches or estoppel are equitable and do not apply to a case where the court never acquired jurisdiction over the person of the defendant (Irving v. Rodriquez, 27 Ill. App. 2d 75; Hustana v. Hustana, 22 Ill. App. 2d 59, 65; Stern v. Sheffield, 2 Ill. App. 2d 311). Laches is never a defense to a void judgment. It may be impeached at any time, and no defense on the merits is required to be shown in order to vacate it (Ray v. Moll, 336 Ill. App. 360, 365; Green v. Unity Container Corp., 7 Ill. App. 2d 215, 221; Hustana v. Hustana, 22 Ill. App. 2d 59, 65). Furthermore, it was not until October 13, 1960, appellee learned that he was a necessary party to the condemnation proceeding, and his motion to vacate the prior judgment was filed on November 10, 1960.

Inasmuch as the court lacked jurisdiction over the defendant, Harold William Kronsbein, the judgment rendered against him is null and void, and not merely voidable, and it may be attacked at any time, in any court, either directly or collaterally (Rompza v. Lucas, 337 Ill. App. 106, 116; Bernard v. Michael, 392 Ill. 130, 135). "A decree or order of condemnation does not bind any proper party to the condemnation unless due service was had on

such party'' (Ill. Power Co. v. Miller, 11 Ill. App. 2d 296, 307). A payment to the life tenant in a condemnation proceeding is of no effect as to the remainderman (Bartlow v. C. B. and Q. R. R. Co., 243 Ill. 332, 336).

The judgment of the Circuit Court of Madison County must be affirmed.

Judgment affirmed.

Reynolds, J., concurs.

Wright, J., concurs.

Publish in full.

APPENDIX D.

The Trustees of Schools of Township Three (3) Range Nine (9) West of the Third Principal Meridian, in Madison County, Illinois, etc. et al., vs. Harold William Kronsbein, defendant, et al.,

---

Opinion of the Hon. Michael Kinney, trial judge.

Opinion and order on motion to vacate and set aside judgment against defendant, Harold William Kronsbein, filed August 2, 1963, as follows:

On November 10, 1960, the defendant, Harold William Kronsbein, filed a motion to vacate and set aside the judgment entered in this cause as to him for the reason that this court had neves acquired jurisdiction over him. The motion was argued and affidavits and oral testimony were offered in support of said motion and against it.

The proceeding in this court involved was brought to condemn a certain tract of ground and, parties were made defendants, who were alleged to have interests in said land by reason of the will of Henry Fehling.

It is the contention of the defendant, Harold William Kronsbein, that he had a vested remainder interest in said property and, that he was a necessary party to said proceeding, and, that the court never obtained jurisdiction over his person, and, therefore any judgment, or orders, entered against him are void and can be raised at any time.

On August 13, 1953, the then Trustees of Schools, John Harbig, John Kunnemann and George Hughes, as petitioners, commenced a Petition for Condemnation making

certain parties defendants, including W. J. Steele and Ivy Steele, Trustees, Frieda M. Kronsbein and Harold William Kronsbein.

In said petition it was alleged, that one, Henry Fehling, deceased, was at the time of his death the owner in fee simple of the land in question. That he left a will, admitted to probate on September 12, 1910, and that W. J. Steele and Ivy Steele were named trustees under said will of the land in question, and held the same for Frieda M. Kronsbein for her life, and that said trustees, Frieda M. Kronsbein, and the Harold William Kronsbein as the son and issue of the said Frieda M. Kronsbein had a certain interest in said real estate under said will.

The petition further alleged that the said Henry Fehling, under said will, gave and devised the land in question, after the death of Frieda M. Kronsbein, to her issue, if any, and that the said Harold William Kronsbein was the son and **sole** issue of the said Frieda M. Kronsbein. That by the terms of said will Henry Fehling gave and devised said land on the death of Frieda M. Kronsbein, or if she should die before the said Henry Fehling, **to her issue, if any, and if none,** then to his grandchildren share and share alike; and stated the names of the grandchildren and that said grandchildren had an interest in said land in the nature of contingent remainder.

The petition prayed for the issuance of summons to the named defendants.

A summons was issued by the Clerk of this court on August 13th, 1953, and, on the return of said summons appeared the following:

> "I have duly served the said summons on the defendant, Harold William Kronsbein on the 17th day of August, 1953, by leaving a copy of said sum-

mons on said date at his usual place of abode with Frieda M. Kronsbein, a person of the family of said Harold William Kronsbein, of the age of ten years and upwards and by informing such person with whom said summons was left of the contents thereof and by also sending a copy of said summons on the 18th day of August, 1953, in a sealed envelope, with postage fully prepaid, addressed to said defendant, Harold William Kronsbein, 2406 Nameoki Road, Granite City, Illinois at his usual place of abode, as stated hereinabove in my return."

On the same date, August 13th, 1953, that the petition for condemnation was filed and the summons issued, Harry Faulkner, the attorney for the petitioner, filed an "Affidavit of Non-Residency" for the purpose of securing service by publication on the defendants, Esther A. Rode and Harold William Kronsbein in said court, which affidavit was sworn to before the Clerk of this court and appears as follows:

"Harry Faulkner, being first duly sworn says that he is attorney and agent for petitioners; that the defendant, Esther A. Clemons, nee Esther A. Rode, is a non-resident of the State of Illinois, and presently resides at 7848 Gannon, University City, St. Louis County, State of Missouri.

That the said defendant, Harold William Kronsbein, formerly lived and resided with his mother at 2406 Nameoki Road, Granite City, Illinois, but has long since moved from there and on due inquiry, cannot be found, and his present place of residence is unknown, and that upon diligent inquiry, his place of residence cannot be ascertained.

And further affiant sayeth not."

It is noted that, while it is alleged Esther A. Rode was a non resident, no such allegation appears as to Harold William Kronsbein.

A publication was run in the Granite City Press Record, which was attached to "Clerk's Certificate of Mailing Notice" filed in the Clerk's office on August 20th, 1953. The publication notice on its face showed that it was published on August 17th, August 20th and August 24th, 1953, and said publication and said dates were certified to by a certificate signed by C. E. Townsend, publisher of said paper, on August 4, 1960. The Clerk's certificate showed that on August 20, 1953, she mailed a copy of said summons to "Esther A. Clemons, nee Esther A. Rode, at 7848 Gannon, University City, Missouri," but no mailing of any such certificate to defendant, Harold William Kronsbein, was shown, although an alleged last known address was stated therein in said affidavit for publication.

The said publication required the defendants, Harold William Kronsbein and Esther A. Clemons, to make their appearance by September 21, 1953, or they would be defaulted.

On September 21, 1953, J. C. Steele, an attorney in Granite City, Illinois, filed an Answer on behalf of the trustees under the will of Henry Fehling, Frieda M. Kronsbein, and purportedly on behalf of Harold William Kronsbein.

A preliminary order was entered by this court on November 2, 1953, alleging that the cause was heard on the petition for condemnation and the Answers of the defendant, W. J. Steele and Ivy Steele, Trustees, Frieda M. Kronsbein and Harold William Kronsbein, defendants, and the Amended Answer of William Rapp, defendant.

The order also provided, among other things, in paragraph 9 thereof the following:

> ". . . and that the said defendant, **W. J. Steele and Ivy Steele are the duly appointed, qualified and acting Trustees of the above described tract of land, and**

now hold the same for the benefit, during her lifetime, of Frieda M. Kronsbein, nee Frieda M. Fehling, defendant herein, to pay over to her all profits and income therefrom received; that the said W. J. Steele and Ivy Steele have an interest in the said tract of land as trustees, and the said Frieda M. Kronsbein, nee Frieda M. Fehling, has an interest therein as beneficiary under the said will; that the defendant, Harold William Kronsbein, is the son and issue of the said Frieda M. Kronsbein, nee Frieda M. Fehling; that the said Harold William Kronsbein has a certain interest in said real estate under the said will; that by the terms thereof the said Henry Fehling, deceased, gave and devised certain real estate, including the said tract of land, after the death of the said Frieda M. Kronsbein, nee Frieda M. Fehling, to her issue, if any. That the said Harold William Kronsbein is the son and sole issue of the said Frieda M. Kronsbein, nee Frieda M. Fehling, and that both the said Frieda M. Kronsbein and said Harold William Kronsbein are living."

and in paragraph 10 provided:

"The court further finds, that by the terms of his said will, said Henry Fehling, deceased, gave and devised said tract of land on the death of said Frieda M. Fehling, or if she should die before said Henry Fehling, to her issue, if any, and if none, then to his grandchildren, share and share alike. That the said Harold William Kronsbein, Frederick Lester Fehling, Amos H. Rode, Esther A. Clemons, nee Esther A. Rode, Henry E. Lueders, Wesley A. Lueders and Conrad C. Lueders, are all the grandchildren of said Henry Fehling, and are his only grandchildren; that the said grandchildren of said Henry Fehling have some interest in said tract of land in the nature of a contingent remainder."

and in paragraph 13 provided:

> "That under the will of the late Henry Fehling, the present trustees who now hold title to said premises are strictly forbidden to sell same and it is necessary that petitioners proceed to acquire in this proceeding the title to said described premises in accordance with provisions of the statute (Eminent Domain)."

A jury was impaneled and the court, on November 22, 1953, entered its "Judgment Order", and made the same findings as to appearance of the defendants as it did in its said preliminary order, and the same findings as to the interests of the trustees, Frieda M. Kronsbein and Harold William Kronsbein.

The court entered an order on December 23, 1953, distributing $58,893.00 as follows:

> . . . "and it appearing to the court that said Trustees are entitled to the sum of $58,893.00 Dollars in order that they may use the same for the benefit of said Frieda M. Kronsbein, nee Frieda M. Fehling, beneficiary in trust by said Will created."

On November 10, 1960, the defendant, Harold William Kronsbein, filed his motion to vacate and set aside the judgment entered against him, supported by affidavit, alleging that the court never acquired jurisdiction over his person, that no proper publication was had, that no personal service by summons was had upon him, that J. C. Steele had no authority to represent or file an Answer for him, that on the death of his mother the property in question was his, and attached a copy of the last will and testament of Henry Fehling to said motion.

The motion was argued before the court and affidavits were submitted on behalf of the petitioners by Bill Winters, showing publication of notice was had on August 17, 20, 24, and 31, 1953, in the Granite City Press

Record, said affidavit being sworn to on March 18, 1961, and an affidavit of Maurice Dailey filed March 20, 1961.

Evidence was offered in support of said motion to vacate and was heard by the court on December 7, 1961. The defendant, Harold William Kronsbein, testified that on December 7, 1961, he lived at 2412 Madison Avenue, Granite City, Illinois; that he was 44 years old and was born on September 19, 1917; that he is the son of Frieda Kronsbein and that her maiden name was Fehling, and that he is a grandson of Henry Fehling, deceased; that his mother is still living; that his father died in 1951 and at that time he was living in St. Louis, Missouri, and had a permanent address at the George Washington Hotel, and worked for the Katz Drug Company; that he was under social security and had a number thereunder; that he was married and lived in St. Louis for 8 or 9 months and left there in the fall of 1952 when there was a divorce suit filed by his wife, and, at the time his mother, Frieda Kronsbein, was living with him in St. Louis; that he left St. Louis and did not advise his mother, or anyone else where he was going and he went to Chicago, Illinois, in November, 1952, and took up a residence in Chicago at the Y. M. C. A. on South Wabash; that he became employed by the Pixley and Ehlers restaurant chain and worked for them about two and a half years; that he used his correct name and worked under his own name and social security number; that he remained in Chicago about four and one-half years and never left there and continued working there; that he left Chicago in the summer of 1957 and went to Los Angeles, California, and was there about six months and then returned to Granite City; that when he left St. Louis he didn't leave his address, nor did he ever write anyone, not even his mother, about his whereabouts. That from the time he left St. Louis no one, including his relatives, knew of his whereabouts. That he never lived at 2406 Nameoki Road in Granite City, Illinois, and the only places he lived during his lifetime

in Granite City was at 2338 Cleveland and in the 2100 block on Grand, until he returned to Granite in the fall of 1957; that he never knew his mother lived at 2406 Nameoki Road, Granite City, on August 13, 1953, and on said date he did not live there, but was a resident in Chicago, Illinois; that he never knew of, or was he ever advised of the filing of the condemnation suit, and had never received any notice of the suit; that he was acquainted with J. C. Steele, attorney in Granite City, and that the said J. C. Steele did not represent him on August 13, 1953, and that he had never hired him, that he did not give him, or his mother, or any other person a power of attorney to represent him; that J. C. Steele had no authority to file an Answer for him and he never hired him, or any other person to file an Answer in the suit; that he never had any knowledge that an Answer was filed on September 21, 1953; that he first learned of the condemnation suit on October 13, 1960; that he had never received a copy of any publication and had no knowledge of one.

On cross-examination he testified he was claiming an interest under the will of his grandfather; that John and Ivy Steele have been acting as trustees for about twelve years; that John Steele and J. C. Steele were brothers; that in 1953 he didn't know his mother lived at 2406 Nameoki Road, and didn't know it until he returned to Granite City; that from the time he left St. Louis he never communicated with anyone, and, was not sick, or under any disability.

Joseph C. Steele testified that he had practiced law in Granite City for many years and was acquainted with Harold William Kronsbein; that previous to September 21, 1953, he had not seen him since he left Granite City; that Harold Kronsbein had not employed him as an attorney, and, that he had not received a power of attorney to represent him in the matter; that he had knowledge that Harold Kronsbein left the area in 1951; that he heard

two years later after he left St. Louis about a divorce; that he knew by Mr. Faulkner's affidavit that they had not gotten service on the defendant, Harold William Kronsbein, and his mother asked him to file an Answer for Harold and he did.

The undisputed facts show that the defendant, Harold William Kronsbein, never lived at 2406 Nameoki Road in Granite City; that in November, 1951, he moved to St. Louis, then to Chicago and Los Angeles and returned to Granite City in the fall of 1957, and first learned about the suit and his legal rights on October 13, 1960, when advised by his attorney, Fred P. Schuman; and that J. C. Steele never had any authority to represent him.

The affidavit filed as to said defendant, Harold William Kronsbein, for the purpose of acquiring constructive service on him, was fatally defective in the court's opinion, and, by reason thereof, the court failed to acquire jurisdiction over the person of the defendant, Harold William Kronsbein.

The affidavit was not based on non residency, but stated, "on due inquiry cannot be found and his present place of residence is unknown, and that upon diligent inquiry, his place of residence cannot be ascertained." The insufficiency of this affidavit is stated in Section 644, Vol. 1, Chapter 24, Nichols Illinois Civil Practice, which provides as follows:

> "If an affiant states as his ground for publication that defendant is a non resident of the state it is unnecessary to state that he cannot be served with process, since the provision of the statute requiring a statement that process cannot be served upon a defendant relates only to one who is concealed within the state or on due inquiry cannot be found. This is the construction placed by the court upon the statutory words 'so that process cannot be served upon him.' But an affidavit merely stating that upon due

and diligent inquiry defendant's place of residence cannot be ascertained, and stating his last known place of residence, is insufficient for failure to show inability to personally serve defendant."

(Albrecht v. Hittle, 248 Ill. 72, and Anderson v. Anderson, 292 Ill. App. 421, were cited in support of said affidavit.)

Under the wording of the affidavit it was required that the words "so that process cannot be served upon him," be included and a failure to so include such wording made the affidavit fatally defective and the publication based thereon void.

There was no certificate of mailing the notice of publication to the alleged last known place of residence, which is required by Section 14 of Chapter 110, and Section 9 of Chapter 100, Illinois Revised Statutes.

The affidavit failed to include the wording "so that process cannot be served upon him," and in the form filed, was insufficient to sustain a valid service by publication under said Section 14, Chapter 110, Illinois Revised Statutes.

The said statute is strictly construed and a proper affidavit in accordance therewith was necessary to invest the court with jurisdiction over the person of the defendant, Harold William Kronsbein, and a strict compliance with the statute must be shown. (**Illinois Valley Bank v. Newman**, 351 Ill. 380, 383; **Albrecht v. Hittle**, 248 Ill. 72, 73, 74; **Anderson v. Anderson**, 292 Ill. App. 421, 425; **Correll v. Greider**, 245 Ill. 378, 380; **Eddy v. Eddy**, 302 Ill. 446, 451, 452.).

The said affidavit, filed the same day, that the summons was dated and issued, showed that petitioners had knowledge that the defendant, Harold William Kronsbein, was not residing at 2406 Nameoki Road and that said address was not his usual place of abode, but that he had long

since moved from there and on due inquiry could not be found. In fact the uncontradicted evidence is that said defendant had never, at any time, lived at said address.

The preliminary order of the court, dated November 2, 1953, and the judgment order, dated November 23, 1953, stated that the matter was heard on the petition and Answers of defendants, including Harold William Kronsbein. The undisputed evidence before the court shows that said defendant, Harold William Kronsbein, never employed anyone to represent him, nor gave any power of attorney to anyone to represent him or to employ counsel for him, and, that the purported Answer was not only without his authority, but without any knowledge on his part. Where an attorney is without authority to represent a party, an entry of appearance by such attorney has no effect and a judgment entered thereon is void (**Gray v. National Bank of Chicago**, 388 Ill. 124, 128).

The affidavit filed on August 13, 1953, by the attorney for petitioners, showed knowledge on their part of the unknown whereabouts of the defendant, and the evidence of the defendant and J. C. Steele, the attorney who filed the Answer, all show that the defendant had no knowledge of any pending suit against him, and, the proceedings were conducted without the court ever acquiring jurisdiction over him. In fact said affidavit corroborates the testimony that no one knew where defendant, Harold William Kronsbein was, and diligence required a proper affidavit to be filed to comply with the statute.

An Eminent Domain proceeding is a special statutory proceeding (Sanitary Dist. of Chicago v. Munger, 264 Ill. 256; Dept. of Public Works v. Sohm, 315 Ill. 478, 483), and, is a proceeding in law and not in chancery (Sanitary Dist. of Chicago v. Munger, 264 Ill. 256, 259).

In a special statutory proceeding all jurisdictional features must be shown by the record (**Oeth v. Erwin**, 6 Ill.

App. 2d 18, 21, 23; **Krause v. White**, 341 Ill. App. 322, 328; **People ex rel. Lange v. Old Portage Dist.**, 356 Ill. 340, 344); and, in such proceedings a finding by the court that it had jurisdiction is not sufficient. (**Eddy v. Eddy**, 302 Ill. 446, 452; **Cobe v. Guyer**, 237 Ill. 516, 520; **Hook v. Wright**, 329 Ill. 299, 305).

For the reasons stated, the mere finding in the orders of this court, that it had jurisdiction over the person of the defendant is not sufficient in a proceeding for condemnation to show jurisdiction, but such jurisdiction must be shown by and found in the records, and, the records fail to show that the court ever acquired jurisdiction over the person of the defendant, Harold William Kronsbein.

In a condemnation proceeding petitioner was required, at their peril, to ascertain the true owner of the property and the owner is not required to prove his title (**Dept. of Pub. Wks. v. Sohm**, 315 Ill. 478, 483); and the averments in the petition as to title are binding on petitioner (**Sanitary Dist. v. P. Ft. W. & C. Ry. Co.**, 216 Ill. 575, 579; **Dept. of Pub. Wks. v. Sohm**, 315 Ill. 478, 483).

The averments in the petition, and, the language of the will, show conclusively that the defendant, Harold William Kronsbein, was the sole issue of Frieda Kronsbein, and, that immediately at his birth he became vested with the title to said real estate, and was a vested remainderman, subject to be let into possession at the death of his mother.

The provisions of the will prohibited the trustees from selling or encumbering the property in question. The trustees only interest was to collect the income from rents, to keep the property in repair, and pay taxes, and their duties terminated at the death of Frieda M. Kronsbein. At most the trustees had a life estate for the life of Frieda M. Kronsbein (**Gridley v. Gridley**, 399 Ill. 215, 226).

The cases are replete, under the facts as disclosed in this case, that the defendant, Harold William Kronsbein, had a vested remainder interest in the land in question and was a necessary party (**Tolley v. Wilson**, 371 Ill. 124, 130, 131; **Fleshner v. Fleshner**, 378 Ill. 536, 538, 539; **Barker v. Walker**, 403 Ill. 302, 307; **Hinrichson v. Hinrichson**, 172 Ill. 462, 465).

The court, in lacking jurisdiction over the defendant, Harold William Kronsbein, any judgment rendered against him is null and void. In the recent case of **Irving v. Rodriquez**, 27 Ill. App. 2d 75, the court on page 79 held:

> "A void judgment as distinguished from a voidable judgment may be vacated at any time even after the expiration of the prescribed period within which judgment ordinarily may be vacated. The duty to vacate a void judgment is based upon the inherent power of the court to expunge from its records void acts of which it has knowledge. The doctrines of laches and estoppel do not apply. Stern v. Sheffield, 2 Ill. App. 2d 311, 120 N. E. 2d 62.
>
> **Void judgments generally fall into two classifications, that is, judgments where there is want of jurisdiction of the person or subject matter and judgments procured through fraud.** Ward v. Sampson, 395 Ill. 353, 70 N. E. 2d 324; I. L. P., Judgments, Sections 174 and 175. They may be attacked directly or collaterally. Escue v. Nichols, 335 Ill. App. 244, 81 N. E. 2d 652; Rompza v. Lucas, 337 Ill. App. 106, 85 N. E. 2d 467.
>
> A defectively stated cause of action will not destroy jurisdiction if the court has jurisdiction of the subject matter and has acquired jurisdiction of the parties. Baker v. Brown, 272 Ill. 336, 23 N. E. 2d 710; Hiot v. Snodgrass, 315 Ill. 548, 146 N. E. 562; Harris v. Chicago House-Wrecking Co., 314 Ill. 500, 145 N. R. 666."

Other cases in point are **Janove v. Bacon**, 6 Ill. 2d 245, 249; **Rompza v. Lucas**, 337 Ill. 106, 116, 117; **Hustana v.**

Hustana, 22 Ill. App. 2d 59, 65; **Barnard v. Michael**, 392 Ill. 130.

The above cases holding, that a judgment entered by a court which lacks jurisdiction of a party is void and may be attacked at any time, in any court, either directly or collaterally.

Under these decisions the motion to vacate was properly filed and the court has the inherent power to expunge void acts of which it has knowledge.

No question of laches or estoppel could apply in this case because such defenses, besides being equitable, can not apply where the court never acquired jurisdiction over the person of the defendant, Harold William Kronsbein. (Irving v. Rodriquiz, 27 Ill. App. 2d 75-79) (Hustana v. Hustana, 22 Ill. App. 2d 59, 65, 66), and, the Statute of Limitations could not apply because under Section 1, Chapter 83 (Ill. Rev. Stat. S-H), limitations is fixed at 20 years and, said statute would not commence to run until after the death of the life tenant (Farmer v. Reed, 335 Ill. 156).

The undisputed facts show that the defendant, Harold William Kronsbein, had no knowledge of his legal rights until he contacted his attorney, Fred P. Schuman, on October 13, 1960; that his mother, Frieda M. Kronsbein, the life tenant, is still living; that he, through his attorney, filed his motion to vacate on November 10, 1960, and that he was first informed on October 13, 1960, that he was a necessary party to the proceeding in condemnation and that he had a vested remainder interest in said property.

In **Illinois Law and Practice**, Vol. 7, Sec. 116, it is stated:

> "Generally stated, knowledge of facts is an inherent or essential element of laches and there can be no laches where there is no knowledge or means of knowledge. Laches does not operate against a person

ignorant of his legal rights (Riddlesbarger v. Riddlesbarger, 336 Ill. App. 226)."

Petitioners contend that valuable improvements were placed on the property and for this reason the judgment should not be disturbed. In the transcript of the evidence, pertaining to the hearing, on December 7, 1961, counsel for petitioner stated, on page 20, that the junior high school was built and occupied in 1955, and, the undisputed evidence is that the defendant did not return to Granite City until the fall of 1957.

As previously stated, it was the duty of the petitioners, in the condemnation proceeding, to ascertain the title to the premises, and, the averments in the petition are binding on petitioner. The owner is required to prove nothing. The petitioners, at their peril, were required to ascertain the true owner of the property. The petitioners were chargeable with notice of the title, and where petitioners made improvements, having notice of the condition of the title, they have no claim based upon the making of improvements. A case exactly in point on this question is the case of **Clark v. Leavitt**, 335 Ill. 184, 187, 190, 191 and 192, wherein the court, after quoting applicable law, on page 192 held:

> "While it may seem harsh that appellants be not allowed reimbursement for the improvements put upon the premises during the lifetime of Mrs. Leavitt yet it is more important that there be certainty in relation to the laws affecting real estate. Appellants knew, or should have known, that they were purchasing only the life estate of Mrs. Leavitt; and, therefore, cannot be said to have put improvements on these premises in good faith believing that they owned the fee."

So, even if improvements were placed on the premises, petitioners were chargeable with notice of the title and

the interest of the defendant, Harold William Kronsbein, and put said improvements on the premises, at their peril.

The court concludes, that, under the provisions of the will of Henry Fehling, that the trustees had a life estate, terminating at the death of Frieda M. Kronsbein, and that the defendant, Harold William Kronsbein, has a vested remainder interest in the land in question, subject to being let into possession on the death of his mother, Frieda Kronsbein; that he was a necessary party to the proceedings and that the court never acquired jurisdiction over the person of the said defendant, Harold William Kronsbein, and that the orders and judgments entered against him were null and void and of no force and effect; that because of the lack of jurisdiction over the person of the defendant, any defense of laches or estoppel would not apply, and, that because petitioners were chargeable with notice of the title to the property in question the placing of improvements would not bar the claim of the defendant, William Harold Kronsbein.

The briefs submitted by the parties are hereby ordered to be made a part of the record in this cause.

It Is, Therefore, the order and judgment of this court that all of the orders and proceedings of this court previously entered as to, and involving the defendant, Harold William Kronsbein, and the order entered on November 2, 1953, and the judgment order entered on November 23, 1953, be and the same are hereby declared null and void and are hereby vacated, set aside, and expunged from the record and held for naught.

Dated and entered this 2nd day of August, A. D., 1963.

Michael Kinney,
Judge.

APPENDIX E.

Pertinent sections of the Eminent Domain Act of Illinois, Chapter 47, Illinois Revised Statutes-Smith-Hurd-Volume 1:

§ 1. Compensation—Jury.

Private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed. 1872, April 10, Laws 1871-72, p. 402, § 1.

§ 9. View of premises—Verdict.

Said jury shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same, and after hearing the proof offered make their report in writing, and the same shall be subject to amendment by the jury, under the direction of the court or the judge, as the case may be, so as to clearly set forth and show the compensation ascertained to each person thereto entitled, and the said verdict shall thereupon be recorded: Provided, that no benefits or advantages which may accrue to lands or property affected shall be set off against or deducted from such compensation, in any case. 1872, April 10, Laws 1871-72, p. 402, § 9.

§ 10. Judgment and payment where no declaration of taking is filed.

Where no declaration of taking has been filed by petitioner pursuant to Section 2a of this Act, the judge or court shall, upon such report, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such

property and the use of the same upon payment of full compensation as ascertained as aforesaid, within a reasonable time to be fixed by the court, and such order, with evidence of such payment, shall constitute complete justification of the taking of such property. Where a declaration of taking has been filed in the cause the judge or court shall, upon such report, proceed in accordance with Section 2a of this Act. Provided, That in case the petitioner shall dismiss said petition before the entry of such order or shall fail to make payment of full compensation within the time named in such order, that then such court or judge shall, upon application of the defendants to said petition or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and reasonable attorney fees of such defendant or defendants paid or incurred by such defendant or defendants in defense of said petition, as upon the hearing of such application shall be right and just, and also for the payment of the taxable costs. 1872, April 10, Laws 1871-72, p. 402, § 10; 1897, May 14, Laws 1897, p. 217, § 1; 1947, July 21, Laws 1947, p. 905, § 1.

§ 14: (1953) Payment to county treasurer, etc.

Payment of compensation adjudged may, in all cases where no declaration of taking has been filed pursuant to Section 2a of this Act, be made to the county treasurer, who shall, on demand, pay the same to the party thereto entitled, taking receipt therefor, or payment may be made to the party entitled, his, her or their conservator or guardian. In the event that a declaration of taking has been filed in the cause, payment of compensation adjudged shall be made in accordance with Section 2a. 1872, April 10, Laws 1871-72, p. 402, § 14; 1947, July 21, Laws 1947, p. 905, § 1.

§ 14: (1955) Payment of compensation—Jurisdiction of courts—Appeals.

Payment of the final compensation adjudged, including any balance remaining due because of the insufficiency of any deposit made under Section 2.3 of this Act to satisfy in full the amount finally adjudged to be just compensation, may be made in all cases to the county treasurer, who shall, on demand, pay the same to the party thereto entitled, taking receipt therefor, or payment may be made to the party entitled, his, her or their conservator or guardian. Should payment be made to the county treasurer, as is in this section provided, the court in the same eminent domain proceeding in which the award is determined, shall have exclusive jurisdiction to hear and determine all conflicting claims to the compensation so paid to the county treasurer, except where the parties claimant are engaged in litigation in a court having acquired jurisdiction of said parties with respect to their rights in the property condemned prior to the time of the filing of the petition to condemn, and payment by the county treasurer pursuant to the order of court determining such conflicting claims shall be a full acquittance to him. Appeals may be taken from any order determining such conflicting claims as in other civil cases. As amended 1955, July 6, Laws 1955, p. 1017, § 1; 1957, July 11, Laws 1957, p. 2603, § 1; 1959, May 20, Laws 1959, p. 157, § 1.

BLANK PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 29 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 183

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees,

vs.

HAROLD WILLIAM KRONSBEIN, et al.,
Appellant.

On Appeal from the Supreme Court of Illinois.

MOTION

To Dismiss or Affirm.

G. WILLIAM HORSLEY,
316 East Adams Street,
Springfield, Illinois,
MAURICE DAILEY,
Niedringhaus & Edison,
Granite City, Illinois,
PHILIP G. LISTEMAN,
316 Missouri Avenue,
East St. Louis, Illinois,
Attorneys for Appellees.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

BLANK
PAGE

INDEX.

	Page
Motion to dismiss or affirm	1
Statement	3
Points and authorities	8
Suggestions	11
Conclusion	12
Appendices	15
I.	
Pertinent section of Civil Practice Act of Illinois, Section 138, Chapter 110, Illinois Revised Statutes 1953	15
II.	
Pertinent section of Civil Practice Act of Illinois, Section 72, Chapter 110, Illinois Revised Statutes 1959	16
III.	
Pertinent section of Eminent Domain Act of Illinois, Chapter 47, Section 12, Illinois Revised Statutes 1953	18
IV.	
Pertinent section of Civil Practice Act, Chapter 110, Illinois Revised Statutes 1953	18

Cases Cited.

Bachrach v. Burkhardt, 344 Ill. App. 80 at 86, 100 N. E. 2d 334 at 337	9
Barnard v. Michael, 392 Ill. 130 at 135, 63 N. E. 2d 858 at 861-862	8

Cherin v. The R. & C. Co., 11 Ill. 2d 447 at 454, 143 N. E. 2d 234 at 238 8
Chicago & Northwestern Railway Company v. The Chicago Mechanics Institute, 239 Ill. 217, 87 N. E. 942 10
Congress of Industrial Organization v. McAdory, 325 U. S. 476, 89 L. Ed. 1745 8
Convers v. The Atchison, Topeka and Santa Fe R. R., 142 U. S. 671, 35 L. Ed. 1153..... 12
County of Cook v. Vander Wolf, 394 Ill. 527 at 528, 69 N. E. 2d 260 at 263 10
Hulbert v. Chicago, 202 U. S. 275, 50 L. Ed. 1026 8
In re: Petition of Stern, 2 Ill. App. 2d 311 at 314, 120 N. E. 2d 62 at 64 8
The People v. Kidd, 398 Ill. 405 at 409, 75 N. E. 2d 851 at 854 9
Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123... 8

Miscellaneous Cited.

Rule 16, Revised Rules of United States Supreme Court 1
Section 14, Chapter 47, Illinois Revised Statutes 1953. .....2, 3, 7, 9
Section 14, Chapter 110, Illinois Revised Statutes 1953 .....2, 3, 4, 8, 11
Section 72, Chapter 110, Illinois Revised Statutes 1959 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. .....

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees,

vs.

HAROLD WILLIAM KRONSBEIN, et al.,
Appellant.

On Appeal from the Supreme Court of Illinois.

MOTION

To Dismiss or Affirm.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MOTION TO DISMISS OR AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of this court, move to dismiss this appeal, or to affirm the judgment of the Supreme Court of Illinois, for the following reasons:

1. It does not question the validity of any statute of Illinois on the grounds of its being repugnant to the constitution, the treaties or laws of the United States, nor does it involve the validity of any treaty or statute of the United States.

2. It does not involve any substantial federal question, but merely raises a question of the interpretation of a statute entirely local to Illinois, without involvement of any federal question but adequately based upon well settled non-federal grounds.

3. It does not raise any question as to the validity of the statute (Section 14, Chapter 110, Illinois Revised Statutes 1953) interpreted by the Supreme Court of Illinois in deciding the question of whether the trial court had jurisdiction of appellant.

4. The Supreme Court of Illinois merely decided that the trial court had jurisdiction of appellant at the time the condemnation judgment was entered. Since jurisdiction was the only question before that court, the time for a direct appeal on the merits of the condemnation proceeding has long since expired.

5. The reference by the Supreme Court of Illinois to Section 14, Chapter 47, Illinois Revised Statutes 1953, was not necessary to the decision reached by that court. The decision, however, does not deny appellant just compensation for his interest in the real estate condemned.

STATEMENT.

The appellant in his statement of this case has misdirected this court as to the question passed upon by the Supreme Court of Illinois.

What that court decided was that appellant was properly in court, and subject to the jurisdiction thereof in 1953 by reason of substituted service made pursuant to Section 14, Chapter 110, Illinois Revised Statutes 1953 (See Opinion A, 3 and 4). The court's reference to the application of Section 14, Chapter 47, Illinois Revised Statutes 1953, to the facts of this case was obiter dictum and was not necessary for the determination of the question presented by the appeal.

In November, 1960, an attempt was made to open this litigation when appellant, then 43 years of age, filed his petition to vacate a condemnation judgment rendered against him in November, 1953. His petition, filed in the same court that rendered the judgment, prayed that the judgment entered in the condemnation case be vacated for want of jurisdiction over his person, either by personal service or by substituted service (Abs. of Rec. in Ill. Su. Ct., 32 and 33).

Over objection of appellees, evidence was heard on appellant's petition and the trial court found that appellant had never been served with process and that the judgment was therefore void as to him (Appendix D, pg. A38).

Appellee perfected an appeal to the Appellate Court of Illinois (an intermediate court of review) and that court affirmed the judgment of the trial court (Appendix C, pg. 9, A22).

The Supreme Court of Illinois upon application by appellee granted leave to appeal from the judgment of

the Appellate Court and reversed both the judgment of the trial court and that entered by the Appellate Court, and denied a petition for rehearing filed by appellant (Appendix A, pg. A5).

The sole question before all of these courts was whether the trial court had obtained jurisdiction of the appellant by a publication notice based upon an affidavit as prescribed by Section 14, Chapter 110, Illinois Revised Statutes 1953 (Appellee's Appendix I). The Illinois Supreme Court decided that the affidavit for publication was sufficient and that the trial court did have jurisdiction of appellant at the time the condemnation judgment was entered.

The sole purpose of the motion to vacate the judgment of 1953 was to re-open that litigation on the grounds that the trial court did not have jurisdiction of the person of appellant either by personal or substituted service. The motion was authorized by Section 72, Chapter 110, Illinois Revised Statutes 1959 (Appellee's Appendix II).

When the Illinois Supreme Court determined that the trial court did have jurisdiction of appellant at the time the condemnation judgment was entered, all other questions, including the payment to the County Treasurer, becamme moot as the time to appeal therefrom on any issue except juridiction had long since expired (Appellee's Appendix III and IV).

The statement filed by appellant so garbles the facts with reference to the condemnation proceeding that we feel they should be restated.

In 1910, Henry Fehling died testate, the fee simple owner of the land in question. By Article Ten of his will he left the real estate here involved to his executors and trustees who were directed not to sell or mortgage any part thereof, but to pay the annual income to his daughter, Frieda M. Fehling (later Frieda M. Kronsbein). By

Article Eleven of his will he provided that upon the death of his aforesaid daughter, either before or after his death, her share was to go to her **issue**, if any, and in the event she left no **issue** then to his grandchildren, whoever they may be (Rec. in Ill. Sup. Ct. 34-43).

Frieda Fehling Kronsbein, daughter of Henry Fehling, was living at the time appellant filed his petition to vacate the condemnation judgment. She died on April 1, 1965, while this case was pending in the Illinois Supreme Court (Add. Statement, Brief and Argument filed by appellant in Ill. Sup. Ct., pg. 3).

In August, 1953, the appellees filed a petition to condemn 36.16 acres of the real estate above mentioned. After the formal allegations contained in such petitions, appellees alleged:

> "that the defendant, Harold William Kronsbein, is the son and issue of the said Frieda M. Kronsbein, nee Frieda M. Fehling; that the said Harold William Kronsbein has a certain interest in said real estate under the said will; that by the terms thereof the said Henry Fehling, deceased, gave and devised certain real estate, including the said tract of land, after the death of the said Frieda M. Kronsbein, nee Frieda M. Fehling, to her issue, if any. That the said Harold William Kronsbein is the son and sole issue of the said Frieda M. Kronsbein, nee Frieda M. Fehling."

The petition set forth an alternative allegation wherein the grand-children of Henry Fehling were named, and it was alleged that their interest, if any, in the land involved was in the nature of a contingent remainder (Rec. in Ill. Su..Ct. 7).

Service was had upon all parties named in the petition, either personally or by publication, as has been decided by the Supreme Court of Illinois (Appendices A and B).

Thereafter, in November, 1953, the court entered an order finding in part, as follows:

> "that the defendant, Harold William Kronsbein, is the son and issue of the said Frieda M. Kronsbein, **nee Frieda M. Fehling; that the said Harold William Kronsbein has a certain interest in said real estate under the said will; that by the terms thereof the said Henry Fehling, deceased,** gave and devised certain real estate, including the said tract of land, after the death of the said Frieda M. Kronsbein, nee Frieda M. Fehling, to her issue, if any. That the said Harold William Kronsbein is the son and sole issue of the said Frieda M. Kronsbein, nee Frieda M. Fehling, and that both the said Frieda M. Kronsbein and said Harold William Kronsbein are living."

That order concluded with an adjudication that a judgment of condemnation be entered and that the matter of ascertaining the amount of just compensation be submitted to a jury.

A jury was impaneled and the value of the land taken was fixed and determined.

On November 23, 1953, the court entered its judgment order on the verdict of the jury and among other findings provided as follows:

> "It Is Further Ordered and Adjudged by the court, that the judgments herein mentioned for the tract or parcel of land as described in the petition, and more fully described in the preliminary order of this court, shall be in full compensation for land taken, and for all compensation and damages of every character to land not taken.
>
> It Is Further Ordered and Adjudged by the court, that petitioners within a period of 30 days from this date, which the court finds to be a reasonable time, shall pay the respective sums above set forth, being

the amount of just compensation ascertained and reported by the jury and the stipulation of the parties, to the County Treasurer of Madison County, Illinois, **for the benefit of owners of, and parties interested in said tract of land,** and upon payment thereof in full, petitioners and their successors in office or assigns, shall have the right to enter upon the tract or parcel of land described in said petition and more particularly described in the preliminary order of this court, for the purposes therein set forth, as follows:"

"It Is Further Ordered, Adjudged and Decreed by the court that the filing of the receipt of the Treasurer of Madison County, Illinois, showing the payment of said monies by petitioners, as herein determined for said tract or parcel of land, shall constitute a complete justification and satisfaction for the tract or parcel of land as herein above described."

The court did not in that order determine and fix the interests of the defendants in the condemnation suit.

Thereafter, appellees, in accordance to the provisions of that order and under the sanction of Section 14, Chapter 47, Illinois Revised Statutes 1953, paid the County Treasurer the amount fixed by the order for the land involved, and have been in continuous and exclusive possession thereof ever since.

With that payment appellees' obligation to the defendants in the condemnation case terminated.

POINTS AND AUTHORITIES.

I.

The appeal does not question the judgment of the Illinois Supreme Court in its interpretation that the trial court had jurisdiction of appellant pursuant to Section 14, Chapter 110, Illinois Revised Statutes 1953.

(A)

This court accepts the conclusion of the state court as to the proper construction of its statutes.

No Federal question is presented to this court for review, inasmuch as no Federal question was decided by the Illinois Supreme Court, nor could such question have been decided by that court, as it was not presented for decision.

Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123;
Congress of Industrial Organization v. McAdory, 325 U. S. 476, 89 L. Ed. 1745;
Hulbert v. Chicago, 202 U. S. 275, 50 L. Ed. 1026.

(B)

A petition to vacate an order, judgment or decree filed more than thirty days after the entry thereof, and made to the court that rendered it, is a collateral attack upon such order, judgment or decree.

Cherin v. The R. & C. Co., 11 Ill. 2d 447 at 454, 143 N. E. 2d 234 at 238;
In re: Petition of Stern, 2 Ill. App. 2d 311 at 314, 120 N. E. 2d 62 at 64;
Barnard v. Michael, 392 Ill. 130 at 135, 63 N. E. 2d 858 at 861-862.

(C)

Jurisdiction is authority to hear and determine a cause. It is the power conferred by law to hear and determine controversies concerning certain subjects between parties who are properly before the court, either by voluntary appearance or service of process; and, as applied to any particular controversy, jurisdiction is the power to hear and determine that controversy as between the parties thereto who are before the court. What may be adjudged between the parties is the exercise of jurisdiction, and no error in the exercise of jurisdiction, no matter how gross, can be urged in any collateral proceeding. If a court has jurisdiction its judgment may be directly attacked for errors or irregularities, but however manifestly erroneous the decision may be, it is binding upon all parties and privies until it is reversed or set aside in a direct proceeding for that purpose.

The People v. Kidd, 398 Ill. 405 at 409, 75 N. E. 2d 851 at 854;

Bachrach v. Burkhardt, 344 Ill. App. 80 at 86, 100 N. E. 2d 334 at 337.

II.

Appellant was not deprived of his interest in the real estate by the payment of the value fixed therefor to the County Treasurer pursuant to Section 14, Chapter 47, Illinois Revised Statutes 1953.

(A)

"Both the constitutional and statutory requirements of just compensation are satisfied when the amount ascertained as such is paid to the county treasurer for the benefit of the owners and parties interested in the premises. This payment to the treasurer fully protects the rights of

all parties and when the compensation money is so paid, all connection of the petitioner with the case ceases and it is no further concerned with it. (Forest Preserve Dist. v. Chicago Title and Trust Co., 351 Ill. 48; Public Service Co. v. Rietveld, 320 Ill. 56.) The treasurer holds the money in trust for the owners thereof, who may compel payment to them at any time, either by petition in the same proceeding, or by some appropriate action, either at law or in equity, in the same or some court other than the one which entertained the condemnation proceedings. (City of Chicago v. McDonough, 351 Ill. 200.) It would be against public policy and contrary to the spirit and intent of the constitutional and statutory provisions concerning the right of eminent domain to hold that the public use of the property must be delayed until all interests in the property have been ascertained and the proper distribution of the compensation money definitely determined."

County of Cook v. Vander Wolf, 394 Ill. 527 at 528, 69 N. E. 2d 260 at 263;

Chicago & Northwestern Railway Company v. The Chicago Mechanics Institute, 239 Ill. 217, 87 N. E. 942.

SUGGESTIONS.

I.

In his motion to vacate the 1953 judgment, appellant claimed it was void because the court did not acquire jurisdiction over him either by personal or by substituted service. His contention in this regard was true he said, because the affidavit upon which the publication notice was predicated was not sufficient to give the court jurisdiction.

The Illinois Supreme Court held that the affidavit was in compliance of Section 14 of Chapter 110, Illinois Revised Statutes 1953 and that the judgment in the condemnation proceeding was binding upon appellant.

Appellant does not now question that ruling. Jurisdiction over the person of appellant was the only issue raised by the motion he filed in the trial court and that was the only issue decided by the Illinois Supreme Court.

Inasmuch as the time to appeal from the 1953 judgment had expired at the time appellant's motion to vacate was filed, that judgment was final and is binding upon him.

II.

The language of the Illinois Supreme Court relating to the payment to the County Treasurer by appellees was not necessary for a decision that the trial court had jurisdiction of the appellant at the time the 1953 judgment was entered. However, no constitutional rights of the appellant have been denied him by the use of such language.

The interests of the parties in the real estate taken in the condemnation proceedings had not been determined

prior to the judgment of condemnation. The judgment ordering payment to the County Treasurer protected the rights of all interested persons. The fund paid by appellee for the real estate was held by the County Treasurer in lieu of the real estate ordered taken. Any interested party was free to petition the Court for an order on the County Treasurer directing payment of that fund, or any part thereof to him, or for any other protective order. The court having had jurisdiction of appellant in the original condemnation proceedings, he is now in no position to complain that payment of that fund was erroneously made, or that his rights thereto were not fully protected. If the order of distribution was not satisfactory a right to appeal therefrom was preserved to him (See Appendix III).

The case of **Convers v. The Atchison, Topeka and Santa Fe R. R., 142 U. S. 671, 35 L. Ed. 1153,** cited by appellant, is distinguishable from this case for two reasons, (1) the interests of the parties in the real estate were not disputed, and (2) the case was a direct appeal from a trial court judgment.

CONCLUSION.

We respectfully submit that the Motion to Dismiss or Affirm should be allowed because this case does not involve a question of the constitutionality of any statute, nor any question of great public importance. The only issue passed upon by the Supreme Court of Illinois in this case was an interpretation of an Illinois Statute (Sec. 14, Chap. 110, Illinois Revised Statutes, 1953) and no complaint is directed against the decision in that respect. The reference by the Illinois Supreme Court to the payment by appellees to the County Treasurer was not necessary to the opinion, but it does not deprive appellant of his property without due process of law since the

appellant at all times was subject to the jurisdiction of the trial court.

All of which is respectfully submitted,

G. WILLIAM HORSLEY,
316 East Adams Street,
Springfield, Illinois,

MAURICE DAILEY,
Niedringhaus & Edison,
Granite City, Illinois,

PHILIP G. LISTEMAN,
316 Missouri Avenue,
East St. Louis, Illinois,
Attorneys for Appellees.

BLANK
PAGE

APPENDICES.

No.

I. Pertinent Section of Civil Practice Act of Illinois, Section 138, Chapter 110, Illinois Revised Statutes 1953.

II. Pertinent Section of Civil Practice Act of Illinois, Section 72, Chapter 110, Illinois Revised Statutes 1959.

III. Pertinent Section of Eminent Domain Act of Illinois, Chapter 47, Section 12, Illinois Revised Statutes 1953.

IV. Pertinent Section of Civil Practice Act. Chapter 110, Sections 198 and 200, Illinois Revised Statutes 1953.

I.

Pertinent Section of Civil Practice Act of Illinois Section 138, Chapter 110, Illinois Revised Statutes 1953.

138. § 14. (Service by publication—Affidavit—Mailing—Certificate.) Whenever, in any civil action affecting property or status within the jurisdiction of the Court, including an action to obtain the specific performance, reformation, or rescision of a contract for the conveyance of land, or in any action at law to revive a judgment or decree, plaintiff or his attorney shall file, at the office of the Clerk of the court in which his suit is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the Clerk shall cause publication to be made in some newspaper published in the county where the suit is pending, and if there be no newspaper published in such county, then in a newspaper published

in an adjoining county in this state, having a circulation in the county in which suit is pending, containing notice of the pendency of such suit, the title of the court, the title of the case, showing the names of the first named plaintiff and first named defendant, the number of the case, the names of the parties to be served by publication, and the date on or after which default may be entered against him; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to each such defendant whose place of residence is stated in such affidavit. The certificate of the Clerk, that he has sent such copy in pursuance of this section shall be evidence that he has done so. As amended by act approved Aug. 8, 1949. L. 1949, p. 1191.

II.

Pertinent Section of Civil Practice Act of Illinois, Section 72, Chapter 110, Illinois Revised Statutes 1959.

72. § 72. Relief from judgments and decrees. (1) Relief from final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(2) The petition must be filed in the same proceeding in which the order, judgment or decree was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(4) The filing of a petition under this section does not affect the order, judgment or decree, or suspend its operation.

(5) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order, judgment or decree pursuant to the provisions of this section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order, judgment or decree but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order, judgment or decree.

(6) Any order entered denying or granting any of the relief prayed in the petition is appealable.

(7) Nothing contained in this section affects any existing right to relief from a void order, judgment or decree, or to employ any existing method to procure that relief. As amended by act approved July 19, 1955. L. 1955, p. 2238.

III.

Pertinent Section of Eminent Domain Act of Illinois, Chapter 47, Section 12, Illinois Revised Statutes 1953.

12. Appeal. § 12. In all cases, in either the circuit or county court, or before a Circuit or County Judge, an appeal as in other civil cases shall lie to the Supreme Court, except that no appeal shall lie from any order denying a motion to strike the declaration of taking and dismiss the suit, unless notice of appeal is filed within 30 days from the entry of the order, and for the purposes of such appeal such order shall be deemed to be a final order. As amended by act filed Aug. 13, 1949. L. 1949, p. 866.

IV.

Pertinent Section of Civil Practice Act, Chapter 110, Illinois Revised Statutes 1953.

"198. § 74. (Method of Appellate review.) (1) Every order, determination, decision, judgment or decree, rendered in any civil proceeding, if reviewable by the Supreme or Appellate Court of this State by writ of error, appeal or otherwise, shall hereafter be subject to review by notice of appeal, and such review shall be designated an appeal and shall constitute a continuation of the proceeding in the court below. Such appeal shall be deemed to present to the court all issues which heretofore have been presented by appeal and writ of error.

(2) All distinctions between the common law record, the bill of exceptions and the certificate of evidence, for the purpose of determining what is properly before the reviewing court, are hereby abolished. The trial court record shall include every writ, pleading, motion, order, affidavit and other document filed or entered in the cause and all matters before the trial court which shall be cer-

tified as a part of such record by the judge thereof. All matters in the trial court record actually before the court on appeal may be considered by the court for all purposes, but if not properly authenticated the court may order such further authentication as it may deem advisable."

"200. § 76. (Limitation of review—Perfection of appeal.) (1) No appeal shall be taken to the Supreme or Appellate Court after the expiration of ninety days from the entry of the order, decree, judgment or other determination complained of; but, notice of appeal may be filed after the expiration of said ninety days, and within a period not to exceed fourteen months from the entry of the order, decree, judgment or other determination complained of, by order of the reviewing court, entered within the fourteen months, upon motion filed and notice given to adverse parties within one year, and upon a showing by affidavit that there is merit in appellant's claim for an appeal and that the failure to file notice of appeal within the ninety day period, or the failure properly to complete an appeal which was perfected within such period was not due to appellant's culpable negligence. The fact that appellant may have filed a notice of appeal prior to the filing of his motion for leave to appeal shall not deprive the reviewing court of the power in the discretion to grant leave to appeal. The reviewing court in its order granting leave to appeal shall fix the time for the filing (within the fourteen month period) of the notice of appeal which it allows."

SUPREME COURT, U. S.

FILED

JUL 13 1965

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 183

HAROLD WILLIAM KRONSBEIN,
Appellant,

vs.

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees.

On Appeal from the Supreme Court of Illinois.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

KENNETH F. KELLY,
1308a Niedringhaus Avenue,
Granite City, Illinois,

McGLYNN & McGLYNN,
(ROBERT E. McGLYNN),
120 North Main Street,
East St. Louis, Illinois,

Attorneys for Appellant, Harold William Kronsbein.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

BLANK
PAGE

INDEX.

	Page
Statement	1
Argument	12
Conclusion	27

Table of Cases.

Berry v. Chi., 192 Ill. 154, 155, 61 N. E. 498 12

Bartlow v. Chi., B. & Q. R. R. Co., 243 Ill. 332, 336, 90 N. E. 721 19

C. & N. W. Ry. Co. v. Mechanics' Inst., 239 Ill. 197, 87 N. E. 933 23

Chi. and N. W. Ry. Co. v. Miller, 233 Ill. 508, 84 N. E. 683 22

City of Chicago v. McDonough, 351 Ill. 200, 184 N. E. 322 24

Commonwealth Edison Co. v. Allis Chalmers, 211 Fed. S. 712, 722 18

Congress of Ind. Organization v. McAdory, 325 U. S. 476 21

Convers v. Atchison, Topeka and Santa Fe Ry. Co., 142 U. S. 671 26

Crane Construction Co. v. Symons Co., 25 Ill. 2d 521, 527, 185 N. E. 2d 139 12

County of Cook v. Vander Wolf, 394 Ill. 521, 69 N. E. 2d 256 26

Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. Ed. 847, 850 12

Failing v. Failing, 4 Ill. 2d 11, 13, 122 N. E. 2d 167 ...6, 14

First National Bank & Trust Co. v. Evanston, 30 Ill. 2d 479, 481 3

Forest Preserve Dist. of Cook Co. v. Chi. Title & Trust Co., 351 Ill. 48, 55, 183 N. E. 819 23

Gray v. National Bank of Chicago, 388 Ill. 124, 128, 57 N. E. 2d 363 6
Hulbert v. City of Chicago, 202 U. S. 275 .....12, 21
Keyes v. Kimmel, 186 Ill. 109, 114, 57 N. E. 851 12
In re Estate of Leichtenberg, 17 Ill. 2d 545, 8, 9, 131 N. E. 2d 487 4
Larson v. Johnson, 1 Ill. App. 2d 36, 116 N. E. 2d 187 17
La Salle National Bank v. Grayslake, 29 Ill. 2d 489, 492, 194 N. E. 2d 250 .....4, 13
Metropolitan Elevated Ry. Co. v. Eschner, 232 Ill. 210, 83 N. E. 809 22
Mueller v. Elm Park Hotel Co., 391 Ill. 391-8-9, 63 N. E. 2d 365 4
Peo. ex rel. Carpentier v. Treloar, 13 Ill. 2d 596, 601, 150 N. E. 2d 624 12
Public Service Co. v. Rietveld, 320 Ill. 56, 150 N. E. 403 23
Scovill Mfg. Co. v. Cassidy, 275 Ill. 462, 470, 114 N. E. 181 16
Willoughby v. Chicago, 235 U. S. 123 21

Constitution.

United States, Amend. XIV, Sec. 1 .....5, 10, 14, 19, 24

Statutes.

Illinois Rev. Stat., Chapt. 47, Sec. 14 ..2, 11, 15, 16, 18, 20, 26
Illinois Rev. Stat., Chapt. 110, Sec. 13 15
Illinois Rev. Stat., C. P. A., Chapt. 110, Sec. 14 14

Rules of Court.

Illinois Supreme Court Rule 39 .....2, 4, 12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1365.

HAROLD WILLIAM KRONSBEIN,
Appellant,

vs.

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees.

On Appeal from the Supreme Court of Illinois.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

STATEMENT.

Appellees' motion to dismiss or affirm can be summed up as follows:

I. The Supreme Court of Illinois was only required to pass on the question of service by publication and,

therefore, there was no Illinois Statute involved to present a federal question.

II. That the opinion of the Supreme Court of Illinois, as to Section 14 of the Eminent Domain Act of Illinois, was obiter dictum.

III. That the trial court never had determined the title or ownership of the property, and that appellant was not deprived of his interest when compensation was deposited with the county treasurer, pursuant to Section 14 of the said Eminent Domain Act, and the constitutional guaranty of just compensation was satisfied thereby.

All other points raised by appellees are waived in this court, because they were not presented to the Supreme Court of Illinois (Rule 39, Illinois Supreme Court, Chap. 110, Sec. 101.39, Ill. Rev. St. S-H).

Appellees now admit appellant, at all times relevant here, was the owner of the vested interest in the property, but all of the compensation was paid to the life tenant.

Appellees admit, and the record so shows, appellant never received any compensation for his interest in the property.

Appellees admit in their motion in this court that the payment of just compensation is a constitutional guaranty, but argue that the trial court never decided the title and, therefore, the payment of the compensation to the county treasurer, pursuant to Section 14 of the Eminent Domain Act of Illinois, fully protected the interest of appellant.

Appellees, therefore, admit that, if the trial court had decided the title and ownership, payment to the county treasurer could only be for the owners found, and the

Supreme Court's opinion to the contrary denied appellant his constitutional guaranty of just compensation.

The record shows that in the original condemnation proceeding the trial court in his preliminary order, and, in his order entering judgment for the compensation awarded by the jury, found and adjudicated the title and ownership of the property involved, to be in the trustees under the will of Henry Fehling, and in the last named order entered judgment in favor of said trustees, as owners, for the full amount of the compensation (Abs. of Rec. in Ill. Sup. Ct., Pgs. 26-27, Trans. of Rec. 3).

Later, on motion of the appellant, the same trial judge set aside the judgments in condemnation and held them void as to appellant, and held that appellant was the owner of the vested fee in said property, subject only to the life estate of said trustees (Opinion App. D, Juris Stat.).

Appellees took an appeal to the Appellate Court, which is a court of direct appeal since the adoption of the new Judicial Code in Illinois, with the Supreme Court, in the particular case, having a discretionary review (First National Bk. & Trust Co. v. Evanston, 30 Ill. 2d 479, 481). The notice of appeal to the Appellate Court was filed on January 14, 1964, fourteen days after said code went into effect (Abs. of Rec. in Ill. Su. Ct., Pg. 115, Trans. of Rec. Pg. 3).

The Appellate Court affirmed the trial court and also held that the compensation having been paid to a life tenant could not affect appellant's interest (App. C, Pg. A-22)..

Appellees filed a petition for leave to appeal, which became their brief in the Supreme Court, and the points they raised are set out in said petition at page 3 (Trans.

of Rec. 2), and these are the only points appellees can rely on in this court. Appellant filed an answer to the petition for leave to appeal, and set out his points to sustain the trial and Appellate Courts (Answer to petition for leave to appeal, Trans. of Rec., Pg. 9).

Appellant had the right to present any grounds to sustain the lower courts. (LaSalle National Bank v. Grayslake, 29 Ill. 2d 489, 492, 194 N. E. 2d 250; In re Estate of Leichtenberg, 7 Ill. 2d 545, 8, 9,—131 N. E. 2d 487.) But, appellees could not assign any error they had not raised in the appellate court. (Rule 39, Ill. Su. Ct., Mueller v. Elm Park Hotel Co., 391 Ill. 391, 398, 399, 63 N. E. 2d 365.)

The Supreme Court of Illinois pursuant to the issues before it made the following findings and holdings:

(1) On November 10, 1960, Harold William Kronsbein filed a motion to vacate the judgment on the ground that no jurisdiction over him was ever acquired in the eminent domain proceeding, and that the judgment entered in that proceeding was void as to him. (Pg. A-1, A-2.)

(2) That appellant here was the owner of a vested remainder interest in the property, subject to the life estate in the trustees under the will. (Pg. A-2.)

(3) That substituted service by summons did not give any jurisdiction over appellant. (Pg. A-2.)

(4) That the answer filed for appellant was unauthorized and gave no jurisdiction. (Pg. A-2.)

(5) That service by publication was proper (Pgs. A-2-3-4), and

(6) "The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was

> unaffected. In fact, however, the compensation awarded by the jury was deposited with the county treasurer pursuant to an order entered by the court. The disposition thereafter made of the money so deposited cannot affect the rights of the condemnor." (Pg. A-5);

and, after appellant's petition for rehearing, said court entered a modified opinion in which the court held:

> "The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was therefore unaffected. In fact, however, the compensation awarded by the jury was, in accordance with Section 14 of the Eminent Domain Act (Ill. Rev. Stat. 1953, Chapt. 47, para. 14), by order of the court deposited with the county treasurer for the benefit of the owners of, and parties interested in said tract of land. The disposition thereafter made by the money so deposited cannot affect the rights of the condemnor (Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co., 351 Ill. 48, 55; County of Cook v. Vander Wolf, 394 Ill. 528.)" (Pgs. A-7-8) (Opinion Ill. Su. Ct. App. A & B. Juris. Stat.)

Appellees argue *obiter dictum* and that the record does not show a ruling by the trial court on title and ownership. For this reason, and for the convenience of the court, we will review the record, which record will conclusively show the trial court in the original proceedings found and adjudicated title in the trustees under the will of Henry Fehling, and that the Supreme Court's opinion as to section 14 of the eminent domain act was not *obiter dictum*, nor did the said court find defendant was in court by substituted service, but said court found that the service had was by publication and the trial court had jurisdiction in rem.

The Supreme Court of Illinois did not hold that there was substituted service on the Appellant, but in its opinion held there **was no substituted service of process on appellant,** nor was there any personal jurisdiction conferred over him by the void Answer filed for him. The opinion held service by publication was valid (Opinion A-2-Juris. Stat.). Service by publication did not give the trial court jurisdiction in personam, but only in rem for the purpose of enforcing rights in the property (Failing v. Failing, 4 Ill. 2d 11, 13, 122 N. E. 2d 167).

The Supreme Court of Illinois held that appellant was the owner of a vested remainder in the property, and the question before this court is, was appellant denied due process in violation of the Fourteenth Amendment to the federal constitution when no payment was made or secured to him of just compensation for his property.

The proceeding in eminent domain is a special statutory proceeding in which appellees were required to ascertain the true owner and the title at their peril, and appellant was required to do nothing. All of this is admitted by appellees by their failure to raise any error on the holdings of the appellate court, which holdings we have set out in our Jurisdictional Statement, Pgs. 13 and 14, and which appear in the Appellate Court Opinion, App. C-Pgs. A-9-22.

Appellant's Motion to Vacate appears in full in the record (Abs. of Rec. in Ill. Su. Ct., Pgs. 32, 33, Trans. of Rec. Pg. 3), as does the opinion of the trial judge, who was the same judge that entered the judgments in the original opinions (App. D-Juris. Stat., Pgs. A-23-38). The reading of the same will disclose that the Motion to Vacate covered the points that the trial court did not have personal jurisdiction of appellant, that the judgments were void by reason of being predicated on a void answer, that appellant was the owner of a vested interest, that he was

not paid compensation, the requirements in an Eminent Domain proceeding, and the raising of jurisdictional questions on the service of process by publication.

The trial court in his order vacating the judgment held:

> "The preliminary order of the court, dated November 2, 1953, and the judgment order, dated November 23, 1953, stated that the matter was heard on the petition and Answers of defendants, including Harold William Kronsbein. The undisputed evidence before the court shows that said defendant, Harold William Kronsbein, never employed anyone to represent him, nor gave any power of attorney to anyone to represent him or to employ counsel for him, and, that the purported Answer was not only without his authority, but without any knowledge on his part. **Where an attorney is without authority to represent a party, an entry of appearance by such attorney has no effect and a judgment entered thereon is void** (Gray v. National Bank of Chicago, 388 Ill. 124, 128)."

(Abs. of Rec. in Ill. Su. Ct. Pg. 57, Trans. of Rec. Pg. 3.) The trial court held the judgment void because no personal service, and, further, because based on an invalid Answer.

On appeal to the Appellate Court, the points appellees raised therein are set out in our Jurisdictional Statement, Pgs. 12-13.

The trial court in the original proceedings determined title and ownership of the property to be in the trustees under the will, and, entered judgment in favor of said trustees for the full amount of the compensation awarded by the jury. The Supreme Court in applying section 14 of the Eminent Domain Act to these admitted facts has denied appellant compensation for his property, and said opinion is admitted to be repugnant to the

fourteenth amendment to the Federal constitution. (Abs. of Rec. in Ill. Su. Ct. Para. 13, Pg. 23 and Pgs. 24 to 27, Trans. of Rec. Pg. 3.)

Appellees in their petition, in paragraph 8, alleged appellant's interest was a contingent remainder (Abs. of Rec. in Ill. Su. Ct., Pg. 7, Trans. of Rec. Pg. 3) and in paragraph 12 of said petition asked the court to pay compensation to said defendants or to such of them as have any interest in said property; (Abs. of Rec. in Ill. Su. Ct., Pg. 8, Trans. of Rec. Pg. 3.) the Answer filed for appellant denied the allegations of paragraph 7 of the petition wherein it was alleged:

> "That the said Harold William Kronsbein has a certain interest in said real estate under said will,"

and **admitted** the allegations of paragraph 8 of the petition, wherein it was stated appellant's interest was a contingent remainderman. (Abs. of Rec. in Ill. Su. Ct., Pg. 15, Trans. of Rec. Pg. 3.)

The trial court entered a preliminary order, before a jury was called, on November 2, 1953, in which he stated,

> "this cause coming on to be heard upon the petition . . . and the answers of defendants, W. J. Steele and Ivy Steele, Trustees, Frieda M. Kronsbein and **Harold William Kronsbein**, defendants."

In said order the court found appellant had an interest under the will in paragraph 9, and in paragraph 10, found the interest was a "contingent remainder"; and in paragraph 13 held:

> "That under the will of the late Henry Fehling the present trustees **who now hold title to said premises** are strictly forbidden to sell same and it is necessary that petitioners proceed to acquire in this proceeding **the title** to said described premises in accordance with the provisions of the statute."

and then entered a judgment for the condemnation of the property, and the matter of ascertaining the amount of just compensation be submitted to a jury. (Abs. of Rec. in Ill. Su. Ct. Pgs. 17-21, 22, 23 and 24, Trans. of Rec. 3.)

The next day after the entry of the preliminary order a verdict of the jury appears in the record. (Abs. of Rec. in Ill. Su. Ct., Pgs. 24, 25, Trans. of Rec. Pg. 3.)

On November 23, 1953, the trial judge entered his judgment on the verdict of the jury, and again found that he was hearing it on the answer of the appellant. In said order, under paragraph 3, the court stated:

> "3. That the court, by a previous order entered in this cause, **determined all of the preliminary questions, including title and ownership** of said tract of ground sought to be condemned and entered a judgment for condemnation, and called a jury to ascertain the just compensation to be paid to the owner or owners and persons interested in said tract of ground described in said petition and to make a report thereof to the court, except the interest of defendant William Rapp as the court had previously found that the said William Rapp was entitled to a judgment of $4000.00 for his interest in said tract by a valid agreement of the petitioners and the said William Rapp."

and his judgment was as follows:

> "It Is Therefore Ordered, Adjudged and Decreed by the court, that judgment be and the same are hereby entered in the court on the verdict of the jury and also on the stipulation heretofore entered into and approved and in favor of the defendants for just compensation, and all damages for the tract or parcel of land described in said petition as follows:

Wm. Rapp, Lessee, the sum of...$ 4,000.00
W. J. Steele and Ivy Steele, Trustees under the last will and testament of the late Henry Fehling, **owners**, the sum of.....$58,893.00."

(Abs. of Rec. in Ill. Su. Ct. Pge. 25, 26, 27. Trans. of Rec. Pg. 3).

It can be seen from the record, without contradiction, **that the trial court specifically found the trustees under the will had the title to said real estate prior to any hearing on compensation by a jury, and in his judgment order, entered a judgment for the trustees under the will, as owners, for the full amount of the compensation.**

Under said circumstances, and under the decisions of this court, and all of the Illinois decisions, full compensation was ordered paid to said trustees, and the deposit of said compensation with the county treasurer was merely to hold for the benefit of said trustees under the will. (See Point VI, Juris. Stat., Pgs. 28 to 31.) This is borne out by the court's order of distribution of said compensation to said trustees (Abs. of Rec. in Ill. Su. Ct. Pgs. 31 and 32, Trans. of Rec. Pg. 3). Said order was made and entered on **December 23, 1953**, pursuant to a petition filed December 21, 1953, wherein it was stated the court had ordered money paid to the county treasurer for the benefit of the owners, and they, as trustees, asked that it be distributed to them (Abs. of Rec. in Ill. Su. Ct. Pg. 30, Trans. of Rec. 3).

The trial court based its preliminary order of November 3, 1953, wherein he found and determined the title to be in the trustees, as owners, **solely on the pleadings**, as there is no record of any evidence of any proof of title anywhere in the record. The answer, now admitted to be void, could not confer on the court the right to bind appellant under such pleadings.

Appellees, by stating that Section 14 of the Eminent Domain Act only applied as "payment of compensation" under the constitutional guaranty of just compensation, where conflicting interests in the property had not been determined in the original proceedings, have admitted the opinion of the Supreme Court of Illinois, in applying the statute, under the circumstances in the case at bar, where the trial court had determined the title and ownership, was a denial of just compensation to appellant, and repugnant to, in violation of and void, under the due process clause of the Fourteenth Amendment to the Federal Constitution.

ARGUMENT.

I.

A.

Appellees' Points I (B) and (C), Under Their Points and Authorities in Their Motion, Have Been Waived by Their Failure to Present Said Points to the Supreme Court of Illinois.

Appellees in their Petition for Leave to Appeal in the Supreme Court of Illinois raised no such point (See Trans. of Rec., Page 2 and Page 3 of said Petition); nor did they even argue them in said court.

Points not raised were waived in the Supreme Court of Illinois. (Rule 39 of the Ill. Sup. Ct., Chapt. 110, Sec. 101.39, S. H. Ill. Rev. Stat., Vol. 2, 1965; Peo. ex rel. Carpentier v. Treloar, 13 Ill. 2d 596, 601, 150 N. E. 2d 624; Crane Construction Co. v. Symons Co., 25 Ill. 2d 521, 527, 185 N. E. 2d 139.)

Said Rule 39 was in effect at the time of the appeal in this case, and the pertinent part appears, as follows:

> "No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing."

Appellees' Petition for Leave to Appeal in the Supreme Court of Illinois stood as their brief in said court.

This court has followed and recognized the practice of the Illinois Supreme Court.

In **Hulbert v. City of Chicago**, 202 U. S. 275, 50 L. Ed. 1026, the court on page 281 held:

> "According to the practice of the court, an error not assigned is not open to review. Berry v. Chicago,

192 Ill. 154, 155, 61 N. E. 498. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. Keyes v. Kimmel, 186 Ill. 109, 114, 57 N. E. 851. And such rule of practice will be recognized by this court. Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. Ed. 847, 850, 22 Sup. Ct. Rep. 605."

Appellees' motion to dismiss or to affirm is predicated on the proposition that the only thing presented to the Supreme Court of Illinois was the question of jurisdiction obtained by publication.

They have overlooked that, appellant filed an Answer to the Petition for Leave to Appeal, and that while appellees were confined to the points they raised, appellant could sustain the judgment of the trial and appellate court on any ground he wanted to present. (LaSalle Nat'l Bank v. Grayslake, 29 Ill. 2d 489, 492, 194 N. E. 2d 250.)

Appellees by their failure to contest in the Supreme Court certain findings of the Appellate Court are concluded thereby and cannot raise such questions in their motion.

The Supreme Court in its opinion recognized this when it held:

"The defendant [Appellant here] was her only child, and the appellate court held that he was the owner of a vested remainder interest in the property, subject to the life estate in the trustees for the benefit of his mother. This determination is not contested here."

and when it held:

"An answer was filed on behalf of the defendant by attorney, Joseph C. Steele, but at the hearing on the motion to vacate both Joseph C. Steele and the

defendant testified that Steele was not authorized to represent the defendant in the eminent domain proceeding. Whatever consequences may flow from the unauthorized answer, it did not give the court jurisdiction over the defendant." (App. A-2—opinion—Juris. Stat.)

The contentions now that the motion to vacate was too late, under I B, and the question of jurisdiction of the trial court, under I C, have been waived by the Appellees' failure to present it to the Illinois Supreme Court.

II.

The Supreme Court of Illinois Did Not Hold That Appellant Was in Court by Substituted Service, But Held That Service by Publication Was Acquired.

The Supreme Court of Illinois considered Section 14 of the Civil Practice Act of Illinois (Sec. 14, Chapt. 110, Ill. Rev. Stat., S. H. 1963), on Pages A-2 and A-3 of its opinion, and found service to be by publication (Opinion App. A-Juris. Stat., Pgs. A-2, A-3).

In **Failing v. Failing**, 4 Ill. 2d 11 (122 N. E. 2d 167), the court, on Page 13, held:

"It is fundamental too that no decree in personam may be taken against a defendant where service is by publication. Thus the orders appealed from here can be sustained only if the court had jurisdiction to enter an award in rem. Although a court has no power to enter a decree in personam based solely on constructive service of process against a nonresident defendant, it does have power to deal with his property within the court's territorial jurisdiction. Service by publication is usually sufficient where the object of the action is to reach and dispose of property, or of some interest in the property, within the court's jurisdiction."

The Supreme Court of Illinois held that appellant was not served by substituted service. On Page A-2 of the opinion, the court held:

> "In the eminent domain proceeding a summons directed to the defendant was left with his mother at her residence in an attempt to effect 'abode' service as authorized by Sec. 13 of the Civil Practice Act (Ill. Rev. Stat. 1953, Chap. 110, par. 137), but it is conceded that he did not at the time reside with his mother, and so jurisdiction was not secured by that method."

The court never acquired jurisdiction in personam over appellant; the only jurisdiction, as held by the Supreme Court of Illinois, was jurisdiction in "rem".

III.

Language of the Supreme Court is Not Obiter Dictum.

The Supreme Court of Illinois did not construe, but applied Section 14, of the Eminent Domain Act of Illinois, to the particular circumstances of the case at bar, as to appellant, and in so doing has prevented and denied payment of just compensation to said appellant; and by so doing has made said Statute in conflict with, repugnant to and void under the due process clause of the Fourteenth Amendment to the Federal Constitution. Such language is crucial to the question of payment of just compensation and was a legal principle deliberately passed upon in an attempt to show payment of compensation. The language is not obiter dictum.

Appellees have of necessity contended the language is obiter dictum because, with the language being necessary, their whole motion to dismiss or affirm falls. If, however, the language was not necessary, then they argue there is no statute of the State of Illinois involved that

is repugnant to the Federal Constitution, and so no federal question.

But, if the language is essential, then they admit the Supreme Court of Illinois is in error in applying the statute by ruling that the mere deposit of the compensation with the county treasurer absolves appellees from all responsibility as to payment, regardless of the determination of the trial court, or any court, as to title and ownership; and, by reason thereof, said Statute is repugnant to the Federal Constitution.

Appellees have not contested in this court the fact that the question involved was injected for the first time in the proceedings by the opinion of the Supreme Court of Illinois.

Appellees admit that under Section 14 of the Eminent Domain Act, the deposit of compensation is made for the benefit of the owners, but say in the proceeding at bar that the trial court did not determine and fix the interests of the defendants in the condemnation (Motion, Pg. 7), and the interests of the parties in the real estate taken in the condemnation had not been determined prior to the judgment of condemnation (Motion, Pgs. 9-10).

Appellees, by their motion, admit that, if the trial court had determined the title and ownership in the property in the original proceedings, any deposit thereafter of compensation to the county treasurer could only be for the benefit of the owners, as found by the trial court; and it would only be in cases where the court had not so determined title and ownership, and there were conflicting interests to be determined, that by the deposit of compensation with the county treasurer, the condemnors would not be concerned with the disposition thereof.

Appellees, in their motion under Point II of the Points and Authorities, state:

"Appellant was not deprived of his interest in the real estate by the payment of the value fixed therefor to the county treasurer **pursuant to Sec. 14, Chapter 47, Illinois Revised Statutes 1953** (Pg. 9)."

and under A of said Point say:

"Both the **constitutional** and **statutory** requirements of just compensation are satisfied when the amount ascertained as such is paid to the county treasurer for the benefit of the owners and parties interested in the premises. . . ." (Pgs. 9-10).

With this statement, Appellees resolve the question of obiter dictum. **Payment** of just compensation **to appellant** is the constitutional guarantee not to someone else as was done in this case. If the Supreme Court of Illinois had not decided the question of payment, as it did, then it could not have reversed the appellate or trial courts. Jurisdiction in rem alone was not enough. Appellees' determination of title and ownership was at their peril, under the circumstances in this case. Appellees were required to see to it that **payment** was made or secured for the appellant, in order to safeguard his constitutional guarantees. The Supreme Court of Illinois knew this and decided this as a legal principle, and it was not obiter dictum.

Obiter Dictum Defined.

In **Larson v. Johnson**, 1 Ill. App. 2d 36, 116 N. E. 2d 187, the court on pages 40 and 41 held:

"Defendants seek to distinguish these cases on the ground that all that was said with respect to this doctrine in the Illinois decisions cited was obiter dicta. Their argument is that in each case the court decided them adversely to the defendant and only then did it affirm the doctrine above enunciated. When a court has before it various grounds urged

for reversal and it decides that a certain number are valid, it does not follow that because the first ground would have been sufficient for reversal, the other grounds do not deserve equal recognition as the basis for the court's judgment. Whether a legal proposition stated in an opinion is obiter dictum is to be determined from a reading of the entire opinion. If the opinion expressed on a legal question is one casually reached by the court on an issue unrelated to the essence of the controversy or based on hypothetical facts, then it is obiter dictum. If, however, the question involved is one of a number of legal issues presented by the facts of that particular case, the court's decision on that question is not dictum even though it be the last ground of many decided by the court, all in support of its final conclusion. (Goodhart, 40 Y. L. J. 161, 180.) It is often stated that all except that which is necessary to the decision of a case is obiter dictum. This is misleading, for nothing but the bare findings of the court is absolutely necessary to its decision as between the parties. For the purpose of legal precedent, we must look to all the issues presented by the facts of the case and to the legal principles applied by the court in the final determination of those issues. Our Supreme Court has made a distinction between judicial dictum and obiter dictum, meaning that a legal principle deliberately passed upon by a court establishes a precedent. Scovill Mfg. Co. v. Cassidy, 275 Ill. 462, 470."

(Cited in Commonwealth Edison Co. v. Allis Chalmers, 211 Fed. S. 712, 722.)

The Supreme Court of Illinois in the language used, in applying Section 14 of the Eminent Domain Act of Illinois, was in answer to an admitted holding of the Appellate Court of Illinois, which is as follows:

"A payment to a life tenant in a condemnation proceeding is of no effect as to the remainderman (Bartlow v. C. B. & Q. R. R. Co., 243 Ill. 332, 336)" (App. C. Juris. Stat., Pg. A-22).

The Supreme Court of Illinois held:

"The defendant's interest in the property in question arose under the will of his grandfather, which devised the land in question to trustees to pay the income to the defendant's mother for life, and provided that upon her death the land should go to her issue. The defendant was her only child, and the appellate court held **that he was the owner of a vested remainder interest in the property, subject to the life estate in the trustees for the benefit of his mother. This determination is not contested in this court**" (App. A. Juris. Stat., Pg. A-2).

and in the modified opinion of the Supreme Court of Illinois, filed after appellant's petition for rehearing, the court held:

"The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was therefore unaffected. In fact, however, the compensation awarded by the jury was, in accordance with section 14 of the Eminent Domain Act (Ill. Rev. Stat. 1953, chap. 47, par. 14), by order of the court deposited with the county treasurer 'for the benefit of the owners of, and parties interested in said tract of land.' The disposition thereafter made of the money so deposited cannot affect the rights of the condemnors. (Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co., 351 Ill. 48, 55; County of Cook v. Vander Wolf, 394 Ill. 521, 528)" (App. B., Pgs. A-7, A-8, Juris. Stat.).

The said court deliberately passed upon a legal principle, and stated that all appellees had to do was to pay

the compensation to the county treasurer, without given any consideration to the proceedings in the trial court, or to any requirement as to the ascertainment of title, as to which, under the eminent domain act, appellees were required to allege and prove at their peril. (See our Points II, III, Juris. Stat., Pgs. 21 to 27.) The trial court preliminary to the determination of compensation had, by a judgment order, determined the title and ownership of the property. The Supreme Court recognized that in order to comply with its own constitution which requires the payment of, or securing payment of just compensation to appellant, and the due process clause of the Federal Constitution which requires the same, that it would have to hold that payment of compensation was in some way made or secured to appellant. It thus, established a legal precedent and passed on the most crucial legal point in the case. Such holding, though erroneous as to the law, was not and could not be obiter dictum.

IV.

This Court Has Jurisdiction.

As to Point I of appellees' "Points and Authorities", we did not discuss the interpretation of section 14 of the Civil Practice Act of Illinois for the reason it had nothing to do with the issues presented.

The federal question arises out of the failure of appellant to receive any compensation for his property, and this involved, as we have previously stated, the application of section 14 of the Eminent Domain Act of Illinois by the Supreme Court of Illinois in its opinion.

Even if the trial court had jurisdiction in rem, the appellees by alleging and contending at all times, that appellant had no interest to require jurisdiction over him, that the trustees under the will were vested in fee, and had the trial court entering judgments on said allegations

and void answer of the appellant, said judgments in the original proceedings were void and not binding on appellant.

We have fully discussed this matter in our Jurisdictional Statement, and we find no reason from appellees' motion to digress therefrom and we adhere to it (Juris. Stat. Pgs. 2 to 4, 17 to 21). Appellees have cited three federal cases under said point.

In **Willoughby v. Chicago**, 235 U. S. 123, a question of a property assessment in Illinois was involved. The court on page 126 held:

> "If there was anything in this objection, it was obvious from the beginning; and as it was not taken at the trial, it was not open in the Supreme Court of that state and could not be considered here."

In **Congress of Ind. Organization v. McAdory**, 325 U. S. 476, was involved a declaratory judgment proceeding involving the Bradford Act. The record showed parties had agreed not to enforce the act until a companion case was settled.

The court held that the proceeding **was not adversary**, and, further, the assignment of error was not raised in the Supreme Court of Alabama.

In **Hulbert v. City of Chicago**, 202 U. S. 275, involved an assessment to defray the cost of paving a street in the City of Chicago. Plaintiff in error had filed objections to the assessment.

The court on page 280 held:

> "The mere claim in the objections to the confirming of the assessment, **never afterwards brought to the attention of the Supreme Court (Illinois) was not sufficient.** There is no evidence in the record to show

> that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States."

These cases all held no question was ever presented to the state courts to pass on. Such is not the situation in the case at bar.

We are not claiming the Supreme Court of Illinois construed a statute of Illinois. We have stated that said court for the first time in its opinion applied an otherwise valid statute to the case at bar, and in such application made it repugnant to, and in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. We raised the question and appellees admit it by not saying we did not (Juris. Stat. Pgs. 5 to 8; 17 to 21).

V.

Section 14 of the Eminent Domain Act Applies Only if Conflicting Claims Are Presented Before the Jury Trial. In Such an Event the Parties Should Be Required to Present Their Claims in the Hands of the County Treasurer.

Appellees contend under point II of their "Points and Authorities" that the payment to the county treasurer did not deprive appellant of his interest in the real estate.

On page 7 of their motion appellees, in speaking of the order of the trial court dated November 23, 1963, say:

> "The court did not in that order determine and fix the interests of the defendants in the condemnation suit.";

and thereafter appellees paid the amount fixed in the order to the county treasurer under section 14 of the Eminent Domain Act.

Under appellees' Suggestions, on page 11, and under point II, appellees say:

> "The interests of the parties in the real estate taken in the condemnation proceedings had not been determined prior to the judgment of condemnation. The judgment ordering payment to the county treasurer protected the rights of all interested payments."

Under point II, appellees are saying just about what the Supreme Court of Illinois said; then on page 7, they say the trial court in his order of November 23, 1953, did not determine and fix the interests, and on page 11, said the interests had not been determined prior to the judgment of condemnation.

Appellees cite:

Public Service Co. v. Rietveld, 320 Ill. 56, 150 N. E. 403, in which case the rights of the parties had not been determined prior to the calling of the jury.

The court on page 60 held:

> "The rights of the appellants among themselves were not determined prior to the calling of the jury." . . . "where such interests are not established the jury has but one question, namely, the amount of compensation to be paid to the county treasurer for the benefit of the owners and parties interested in the property."

Forest Preserve Dist. v. Title & Trust Co., 351 Ill. 48, 183 N. E. 819.

In this case appellants complained certain "unknown owners" were involved, and that the court erred in not having the interests fixed before proceeding with the jury.

The court on page 55 held: Appellants could not complain that other defendants were not parties; and on page

55 held: That it is not necessary to determine interests before a jury trial, and this could be later determined.

In **City of Chicago v. McDonough,** 351 Ill. 200, 184 N. E. 322.

City of Chicago condemned a piece of ground that belonged to the Chicago Title & Trust Co. Verdict was returned by a jury and paid to the County Treasurer. McDonough, the county treasurer, by agreement with the owner paid sums to certain tax title holders and to appellant, and retained certain portion for current taxes that were due at the time of the condemnation and certain expenses.

Owner sued to recover the retained money.

The court on page 204 held this involved conflicting claims, and lienholder did not have to litigate his claim in the condemnation suit, but could do it in a separate proceeding against the award in the hands of the county treasurer.

There was no claim by the owner of the paying the award to the county treasurer. The Supreme Court declined jurisdiction and transferred the case to the Appellate Court.

In **C. & N. W. Ry. Co. v. Mechanics' Inst.,** 239 Ill. 197, 87 N. E. 933, the petition stated that the Chicago Mechanics' Institute were the owner of the record title in the property in question and that certain named persons were interested in said property, and also there were other persons who were unknown to petitioner, who were interested. Error was claimed because the court refused to instruct the jury to return a verdict as to appellants' interest. Court on pages 216 and 217 held:

> "In condemnation cases the jury are empaneled merely to ascertain and report the just compensation to the owner of the property sought to be taken

or damaged. No issue as to the ownership can be presented to the jury. The question of title, if any, is preliminary to the submission of the question of damages to the jury. The proper practice is to require all persons claiming an interest to litigate and settle their interests in the property prior to empaneling the jury. (Metropolitan Elevated Railway Co. v. Eschner, 232 Ill. 210; Chicago and Northwestern Railway Co. v. Miller, 233 id. 508.)"

"**While this question of title should have been settled first, no such question was raised before the jury was empaneled,** and it is very plain from this record that the failure to so settle the titles did not affect the amount of the verdict. The trial court can, on motion, at any time in the future, settle to whom this money is to be paid. On the facts in this record there may still be a dispute concerning each of these properties as to the ownership of the interests involved. The case of Convers v. Atchison, Topeka and Santa Fe Railroad Co., 142 U. S. 671, we do not consider in point. In that case there was no dispute as to the ownership, and the court held that the trial court should have entered judgment in favor of the property owner without requiring him to make a motion at a later hearing, but held also that the mistake in entering the judgment did not require a new trial, and remanded the cause with specific directions to enter judgment in favor of the property owners for the amount of damages found by the jury. **Taking this decision in its most favorable light for appellants, the only thing that would be required by this court (if there were no question unsettled as to the ownership of these two interests) would be to remand the cause, with directions to the trial court to enter judgment in favor of the respective appellants for the amounts found by the verdict of the jury.** This, as we have seen, cannot be done in this

case, because it is not entirely clear from the record that other parties are not interested."

This latter case supports our position that the trial court had determined the title prior to empaneling the jury, and entered judgment accordingly. There was nothing left to be done, but to pay the money to the trustees under the will.

None of the first three cases are in point as to the facts in the case at bar. Our position has been that where there are conflicting claims, and they are not resolved by the trial court in the condemnation proceeding, then a separate judicial proceeding can be taken to determine said interests, and the court can direct the county treasurer to pay the money to the parties determined entitled to it and on such payment the condemnor can take possession.

However, in the case at bar, the trial court had determined the interests and the payment to the county treasurer could only be for the benefit of said persons. (Convers v. Atchison, Topeka & Santa Fe Ry. Co., 142 U. S. 671; County of Cook v. Vander Wolf, 394 Ill. 521, 527, 528-9, 69 N. E. 2d 256.) We have shown the law in Illinois as to section 14 of the Eminent Domain Act, under our points III and IV, V and VI, Jurisdictional Statement, Pgs. 22 to 31, is as stated in our point V herein.

The trial court in finding ownership in the trustees under the will, and entering judgment for them, the payment of the money to the county treasurer, was for their benefit only. Said trustees having a life estate, this is all appellees obtained in their condemnation, and all of the proceedings as to appellant were void, and his interest was never acquired.

CONCLUSION.

It is respectfully submitted that this court will not undertake to review what was not before the Supreme Court of Illinois.

Appellees' motion under I B, Pg. 8, and I C, Pg. 9, was not the subject of, nor involved in, the opinion of the Illinois Supreme Court, nor were any such points assigned as error in said court. These points, as stated, were waived.

The Supreme Court of Illinois did apply Section 14 of the Eminent Domain Act, and the language of the opinion established a legal precedent and pertained to the crucial point in the case, that being the denial of payment of compensation to appellant, the owner of the vested interest in the property.

The record in the trial court shows conclusively that said court determined the title and ownership of said property to be in the trustees under the will, a life tenant, and entered judgment for said life tenant for the full amount of the compensation, prior to any deposit of compensation with the county treasurer, and said deposit could only have been for the benefit of the said life tenant.

That appellant was never paid any just compensation, that his interest was never acquired, and he has been denied due process by the application of Section 14 of the Eminent Domain Act of Illinois and repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States.

That appellees admit that by a determination of ownership, by the trial court in the original proceedings, compensation would have to be paid to the owners so determined.

A most substantial federal question is involved: the guarantee to every individual to be secure in his property and that the same cannot be taken from him unless he receives just compensation.

Wherefore, appellant in this court respectfully prays that appellees' motion to dismiss or affirm be denied, and that this court take jurisdiction requiring plenary consideration be given by this court, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

KENNETH F. KELLY,
1308a Niedringhaus Avenue,
Granite City, Illinois,
McGLYNN & McGLYNN,

(ROBERT E. McGLYNN),
120 North Main Street,
East St. Louis, Illinois,
Attorneys for Appellant,
Harold William Kronsbein.

END